83-178

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE WESTERN COMPANY OF NORTH AMERICA, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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The undersigned attorney of record hereby certifies that the following listed parties have an interest in the outcome of this case:

The Western Company of North America, Plaintiff
Western Oceanic Services, Inc.
North Star Drilling Co., a partnership
Western Services International, Inc.
Western Oceanic, Inc.
Western Oceanic International, Inc.
Western Oceanic (Cameroon), Ltd.
Western Towers, Inc.
The Western Company Museum, Inc.
Western International Finance, N.V.
Western Oceanic (Malasia), SDN. BDH
Pacesetter Tool Co.
Western Petroleum Services International Co.
Western Petroleum Services, Inc.
J & L Tank, Inc.
Grayco Electrical, Inc.
Aggregate Plant Products Company

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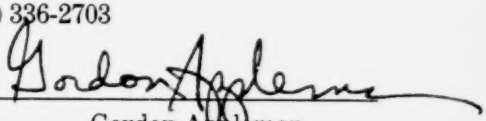
By 
Gordon Appleman

QUESTIONS PRESENTED

1. Whether there can be imposed a tax on the basis of modified Treasury Regulations promulgated by the Treasury Department of the Executive Branch of the Government, when the allegedly superseded regulations had been construed and approved by the judicial branch and were outstanding when Congress reenacted the underlying statutes without change.

2. Whether the Treasury Department stated an adequate basis for modifying the excise tax regulations.

3. Whether the decision below conflicts with prior decisions of the Courts of Appeals.

4. Whether the equality and fairness doctrine requires a decision for Western as to vehicles substantially identical to other taxpayers' vehicles not being subjected to the excise taxes.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE WESTERN COMPANY OF NORTH AMERICA, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner respectfully requests that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit in the case of The Western Company of North America vs. United States of America, No. 81-1397, reported at ___F.2d ___, which reversed and remanded in part and affirmed in part the opinion and judgment of the United States District Court for the Northern District of Texas, Civil No. 4-78-430, not reported. The relevant opinion, jury verdict, and judgments are reproduced in the appendix at A-3 through A-39.

JURISDICTION

On March 4, 1983, the United States Court of Appeals for the Fifth Circuit entered its decision. On May 5, 1983, the Court of Appeals denied Petitioner's Petition for Rehearing.

Jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1) to review the judgment of the United States Court of Appeals for the Fifth Circuit, filed and entered May 5, 1983.

APPLICABLE STATUTES AND REGULATIONS

The federal statutes and regulations involved in this action are Internal Revenue Code Sections 4041(a), 4481(a), and 4482(a), and regulations promulgated thereunder, 26 C.F.R. [All references in this Petition to the "Code" are to the Internal Revenue Code of 1954, as amended, and to "Regs." are to the Treasury Regulations issued pursuant to the Code.]

The particular provisions of the Internal Revenue Code to be construed are Sections 4041(a), 4481(a), and 4482(a), 26 U.S.C. 4041(a), 4481(a), and 4482(a), which impose excise taxes on certain motor fuels and highway use, as follows:

§ 4041 IMPOSITION OF TAX.

(a) Diesel Fuel. There is hereby imposed a tax of 4 cents a gallon upon any liquid (other than any product taxable under section 4081)

(1) sold by any person to an owner, lessee, or other operator of a diesel-powered highway vehicle, for use as a fuel in such vehicle; or

(2) used by any person as a fuel in a diesel-powered highway vehicle unless there was a taxable sale of such liquid under paragraph (1).

§ 4481 IMPOSITION OF TAX.

(a) Imposition of Tax. A tax is hereby imposed on the use of any highway motor vehicle which (together with the semitrailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of more than 26,000 pounds, at the rate of $3.00 a year for each 1,000 pounds of taxable gross weight or fraction thereof. In the case of the taxable period beginning on July 1, 1977, and ending on September 30, 1977, the tax

shall be at the rate of 75 cents for such period for each 1,000 pounds of taxable gross weight or fraction thereof.

§ 4482. Definitions.

(a) Highway motor vehicle. For purposes of this subchapter, the term "highway motor vehicle" means any motor vehicle which is a highway vehicle.

The specific regulations that are pertinent to this action are found at Treasury Regulations on Manufacturers and Retailers Excise Tax (26 C.F.R.) Sec. 48.4041-7, Sec. 48.4061(a)-1, and Treasury Regulations on Excise Tax on Use of Certain Highway Motor Vehicles, Sec. 41.4482(a)-1 (26 C.F.R.), all of which are set out in the appendix, at A-42-46.

STATEMENT OF THE CASE

Petitioner, The Western Company of North America (herein referred to as "Western"), is a corporation in the business of providing specialized services needed in drilling and operating oil and gas wells, including cementing, acidizing and fracturing wells at the well sites. Many sites are remotely situated and can be reached only by traveling substantial distances on private roads and off the public highways. The off-highway terrain is frequently rocky, uneven, muddy and otherwise difficult or impossible to traverse without equipment specially designed for non-highway use. Western uses the public highways only as necessary to move its well servicing equipment to the well site or to return to its local office pending its next assignment. Approximately 70% of most units' time is spent at job sites and only 30% is travel time, some of which 30% is on private roads. The Western equipment at issue in this case is not used on the highway to transport any persons or property except in connection with rendering such services.

Western's services require specialized, sophisticated, large and cumbersome mobile chassis and trailer equipment that is not available as stock items from dealers, but which is acquired by special orders from various manufacturers and is made to engineered specifications designed especially for Western and the severe off-highway conditions and service functions.

The case was submitted in the United States District Court for the Northern District of Texas to the jury on a special verdict. Jurisdiction in the District Court existed under 28 U.S.C. § 1346(a)(1). The form of the verdict required the jury to apply each of two separately stated legal standards (one based upon Treasury Regulations, cases and administrative rulings prior to amendment, and the second standard based upon amended Regulations) to various categories of vehicles. Each of the two different legal standards was embodied in a separate question submitted to the jury. In its answers to Question Number 1 (based upon the primary design test prevailing prior to the modified Regulations) the jury determined that certain of Western's bodyload units and trailer mounted equipment units, were non taxable non-highway vehicles (Appendix A-4), and that the balance of its vehicles (not at issue in this Petition) were taxable highway vehicles. The jury determined under Question Number 2 (based upon the Regulations as modified in 1977) that all of Western's vehicles were taxable highway vehicles (Appendix A-6-11).

The District Court entered judgment on March 5, 1981 (Appendix A-13), in favor of Western in accordance with the jury's verdict under Question Number 1, which the District Court concluded was the correct legal standard for defining a highway vehicle. On June 19, 1981 (Appendix A-14), the District Court entered an amended judgment in favor of Western, and also entered an order denying Defendant's motion for judgment notwithstanding the verdict or for a new trial.

Respondent, as appellant, filed a timely notice of appeal on August 14, 1981. On March 4, 1983, the United States Court of Appeals for the Fifth Circuit reversed and remanded in part and affirmed in part the District Court's ruling. On March 31, 1983, Western filed its Petition for Panel Rehearing. On May 5, 1983, the Court of Appeals denied Western's Petition for Rehearing. The Court of Appeals reversed and remanded the District Court's holding that judgment for Western should be entered on the verdict under the legal standard incorporated in Question Number One submitted to the jury.

The chronology of legislative, judicial, and administrative actions is important to the resolution of the questions presented. The events are summarized as follows:

1917 Congress enacts the manufacturers excise tax (now Section 4061 of the Internal Revenue Code) on vehicles "designed primarily for the transportation in or upon it of persons or property."

1918 The Treasury Department promulgates Treasury Regulations no. 44, containing the "primary design" definition.

1921 The Treasury Department promulgates Treasury Regulations no. 47 similar to Regulations no. 44 defining highway vehicles for purposes of the manufacturers excise tax.

1926 The Senate refers to the design of vehicles as it relates to the purpose of the manufacturers excise tax.

1951 Congress enacts the predecessor to Code Section 4041, the fuels tax on highway vehicles.

1956 Congress enacts Code Sections 4481 and 4482, the use tax on highway vehicles.

1957 The Internal Revenue Service promulgates Rev. Rul. 57-440.

1965 Senate Report No. 324 refers to the established administrative ruling policy involving the primary design test for defining a highway vehicle.

1972 The Court of Appeals for the Fifth Circuit decides the *Big Three Industrial Gas & Equipment Co. v. United States* case, involving the manufacturers excise tax, Code Section 4061.

1975 The Court of Appeals for the Tenth Circuit decides the *Stafford Well Service Inc. v. United States* case involving the highway use tax, Code Section 4481.

The Court of Appeals for the Second Circuit decides the *Allied Bitumens, Inc. v. United States* case, involving the highway use tax, Code Section 4481.

1977 The Treasury Department adopts the modified regulations under Code Sections 4041 (special fuels tax), 4061 (manufacturers excise tax), and 4481 (highway use tax).

Throughout the period prior to 1977 the three excise tax statutes were reenacted or amended in aspects not material to the issues of this case, i.e. other than in the definition of a "highway vehicle," as follows: twenty-seven times for Code Section 4061, six times for Code Section 4041, and three times for Code Section 4481.

This case involves the taxability of Western's vehicles under Code Sections 4041 and 4481 for periods beginning January 13, 1977, the effective date of the amendment of the Regulations.

REASONS FOR GRANTING THE WRIT

SYNOPSIS

This action presents a pure question of law that involves the scope of the authority of the Treasury Department to broaden

the incidence of tax by modifying regulations in disregard of prior court decisions and legislative history. The Treasury failed to state an adequate basis for modifying the Regulations. The construction adopted by the Court of Appeals is contrary to decisions of this Court and decisions of other Courts of Appeals. This construction is not supported by the language of the tax statutes or the legislative history. The decision below disregards the fairness and equality doctrine in taxation.

I.

Under the doctrine of the separation of powers among the three branches of the federal government, the executive branch lacks the power to override prior court decisions and congressional intent in the construction of federal tax statutes.

The significance of the decision below transcends the factual context of this case and involves the total regulatory process. The roles and relative powers of the branches of government are at issue. If this decision stands, the Treasury's regulatory powers will be materially enlarged. To allow the modification of the Regulations in the factual context of this case is to reverse years of precedent.

The chronology set forth above at pages 5 and 6 shows both judicial and congressional approval of the Treasury Regulations that incorporated from the first regulations (Regs. No. 44) the "primary design" test for defining a "highway vehicle" under the excise tax statutes. The first tax was the manufacturers excise tax, originally enacted in 1917.

Treasury Regulations No. 44, issued under the Revenue Act of 1917, provided as follows:

> "Art. VIII. Automobiles — . . . An automobile is a self propelling vehicle, usually designed to run on a road, containing the means of propulsion within itself. . . .

> Art. IX. Automobiles: Scope of tax. — To come within the scope of the tax a machine must be a vehicle or conveyance, that is, *designed primarily* for the transportation in or upon it of persons or property." [Emphasis supplied.]

When Congress enacted the special fuel tax in 1951 (Act of October 20, 1951, Pub. L. No. 82-183, Tit. IV. § 441(a), 65 Stat. 523) (the predecessor to Code § 4041) and the highway use tax (Code § 4481) in 1956, it used the same "highway vehicle" terminology in describing the vehicles to be taxed that was in the manufacturers excise tax statute (now Code § 4061). This use of the same terms that had been in the manufacturers excise tax and defined by reference to the "primary design" test for more than thirty years is significant and indicative of the intended meaning of that same term in the two statutes involved in this case (Code §§ 4041 and 4481). This principle of construction is different from, but complementary to, the reenactment principle, referred to below. Even the Treasury now (under its 1977 Regulations) agrees that "highway vehicle" has a uniform meaning in the three excise tax statutes. The issue is the scope of that meaning, which Western submits should be determined by reference to the lengthy history defining the term.

The original Regulations under the 1951 special fuel tax also excluded "equipment designated primarily for off-highway use." Reg. 119, Sec. 324.10(c). See Appendix A-42.

The same basis for determining taxability was adopted by the Internal Revenue Service in Rev. Rul. 57-440, 1957-2 C.B. 721, as follows:

> It is the position of the Service that the only vehicle chassis and bodies intended to be taxed by this section [4061(a)(1)] are those *primarily designed* for highway use. [Emphasis supplied]

The Court of Appeals for the Fifth Circuit had in 1972 approved this same test in applying the manufacturers excise tax, as follows:

> That the primary design test is the correct legal standard seems to be widely accepted. . . . the Court finds the applicable legal test to be this: that vehicles designed or adapted for purposes primarily or predominantly other than for the transportation of persons or property on the highway, even though incidental highway use may occur, are not subject to the manufacturer's excise tax. *Big Three Industrial Gas & Equipment Co. v. United States*, 329 F. Supp 1273, 1278 (S.D. Tex. 1971), affirmed per curiam 459 F.2d 1042 (5th Cir. 1972).

The vehicles at issue in the *Big Three* case were virtually identical to and performed the same functions as the Western vehicles in this case.

Other cases that adopted the same basis for decision include *Otis Engineering Corporation v. United States*, 376 F. Supp. 109 (D.C. N.D. Tex. 1974); *Carl Nelson Logging Company, Inc. v. United States*, 281 F. Supp. 671 (D.C. Idaho 1967); *Transairco, Inc. v. United States*, 366 F. Supp. 602 (S.D. Ohio 1973).

Then, in 1975, two more Courts of Appeals adopted the same definition of the term "highway vehicle" as it is used in Code §§ 4481 and 4482. See *Allied Bitumens, Inc. v. United States*, 353 F. Supp. 1128 (W.D. N.Y. 1973), aff'd per curiam 458 F.2d 2137 (2d Cir. 1975), reproduced in full at Appendix A-50, and *Stafford Well Service, Inc. v. United States*, 340 F. Supp. 657 (D.C. Wyo. 1972), aff'd per curiam — F.2d — (10th Cir. 1975), reproduced in full at Appendix A-55.

Within months after these two adverse decisions, the Treasury proposed to modify the Regulations that had been construed and applied as set forth above for fifty-eight years (1918

to 1976). These proposed Regulations were adopted, to be effective January 13, 1977. T.D. 7461, 42 C.F.R. 2670, 1977-1 C.B. 317. The new Regulations contained altogether new and more complex criteria for defining highway vehicles, which significantly extended the incidence of the taxes. Compare Regulations at Appendix A-46 with Appendix A-47-49. The new criteria were not based upon any statutory change or based upon any of the court decisions. Rather, the new criteria were arbitrary and unprecedented.

A. The Treasury lacks the power to overrule judicial precedent in applying a statute by subsequently modifying interpretive Regulations.

This modification of the Regulations is an attempt by the Treasury Department to preempt both the role of the Congress to define and determine the incidence of tax statutes it enacts, and of the judiciary to interpret and apply the statutes enacted by Congress. The Treasury lacks the power to overrule Court decisions. *Bingham Trust v. Commissioner*, 325 U.S. 365, 377 (1945) (Regulations are unauthorized if they depart from the rule of a prior controlling court decision); *Commissioner v. Acker*, 361 U.S. 87, 92 (1959).

B. The Treasury Department lacks the power to amend (by modifying the Regulations) the excise tax statutes, into which Congress has incorporated the "primary design" definition of a highway vehicle by frequent reenactment of the statutes.

Because the "primary design" concept has existed for so long and has been acknowledged in Congressional reports, its meaning has been incorporated into the excise tax statutes for the purpose of determining the correct legal standard to be applied under the statutes.

This Court held in *Haig v. Agee*, 453 U.S. 280 (1981), that "*Zemel* recognized that congressional acquiescence may

sometimes be found from nothing more than silence in the face of an administrative policy." This is particularly true when the period of reenactment exceeds twenty years as to Sections 4041 and 4482, and sixty years as to Section 4061, in which the "highway vehicle" terminology originated.

In addition, Congressional Reports indicate that Congress was specifically aware of the administrative interpretation placed on these statutes in the cases, regulations and rulings that preceded the 1977 modification of the regulations. E.g. Senate Report No. 324, Eighty Ninth Congress, First Session (June 14, 1965), explaining the provisions of the Excise Tax Reduction Act of 1965, states as follows:

> "Under present law, a manufacturers' excise tax is imposed on the sale of truck chassis and bodies, bus chassis and bodies, etc. In the statute, there is no requirement that the vehicle be designed for use on the highways although this result has in effect been achieved by administrative ruling." 1965-2 C.B. 643, 711.

See also S. Rep. No. 52, 69th Cong., 1st Sess. (1926), discussing the issue of which vehicles to tax.

Under these circumstances, it is fair to state that Congress adopted the "primary design" definition of a highway vehicle for the three excise tax statutes, under the reenactment principle.

This Court has frequently addressed the reenactment issue. For example, in *United States v. Leslie Salt Co.*, 350 U.S. 383, at 396 and 397 (1956), this Court held:

> Against the Treasury's prior longstanding and consistent adminstrative interpretation its more recent ad hoc intention as to how the statute should be construed cannot stand. Moreover, that original interpretation has had both express and implied congressional acquiescence, through the 1918 amendment to the statute, which has

> ever since continued in effect, and through Congress having let the administrative interpretation remain undisturbed for so many years.

Congress thereby incorporated by reference into the excise tax statutes the considerable judicial and administrative history that is summarized above. Against this background, the modified regulations must fail for the same reasons stated by the Court in the case of *United States v. Vogel Fertilizer Company*, 455 U.S. 16 (1982):

> In addition, Treas. Reg. Sec. 1.1563-1(a)(3) purports to do no more than add a clarifying gloss on a term — 'brother-sister controlled group' — that has already been defined with considerable specificity by Congress.

Petitioner does not argue that the Treasury lacks the authority to issue, or even amend, Regulations under different circumstances. E.g. *Rowan Companies, Inc. v. United States*, 452 U.S. 247 (1981). Petitioner does submit that Treasury's authority is limited under the circumstances of this case.

II.

The Treasury Department failed to present an adequate basis for modifying the Regulations, with the result that the prior Regulations continue to state the operative definition of a "highway vehicle."

For the Treasury to modify these Regulations would violate principles established by this Court. As recently as June 24, 1983, in the case of *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company*, -U.S.-, 51 U.S.L.W. 4953, this Court invalidated the rescission of certain motor vehicle standards, because the "agency failed to present an adequate basis and explanation for rescinding the passive restraint requirement."

Further, "we believe that the *rescission* or *modification* of an occupant protection standard is subject to the *same* test." [Emphasis supplied]

The Treasury similarly failed here to present an adequate basis for its modification of the excise tax regulations. The Treasury's explanation for modification was misleading: "in order to clarify the definition of 'highway vehicle' and to apply such definition uniformly for purposes of various sections of the Internal Revenue Code of 1954." T.D. 7461, 42 F.R. 2670, 1977-1 C.B. 317, 318.

To "clarify" is to make clear or evident, not to change, modify, or make different. That the Treasury's 1977 modification constituted a substantive change is evidenced by the different verdicts reached in this case in answer to the two questions submitted to the jury. The jury answered the first question (based upon the Regulations, decisions and rulings prior to the Treasury's modification) in favor of Western as to the vehicles at issue in this Petition, and answered the second question (based upon the modified Regulations) adversely to Wetern as to these same vehicles. Compare the instructions to the jury under the two questions, reproduced at Appendix A-4 and A-5-11. Note also the additional complexity and administrative difficulty inherent in the modified Regulations.

Further, it was not necessary to modify the Regulations in order to "achieve uniformity." The Courts had already adopted the "primary design" test and applied it uniformly under all three excise tax statutes.

The modifications to the special fuel and highway use excise tax Regulations fail for want of an adequate explanation, there being no change in the underlying statutes to justify a modification in the Regulations that had been outstanding in the same form since the original enactment of the statutes.

The true purpose for the modification is clear from the timing of the initial proposal to amend (shortly after the two adverse decisions of the Courts of Appeal in *Allied* and *Stafford*) and from the substance of the changes — to broaden the incidence of the three excise taxes. "Clarity and uniformity" are disguises that this Court should unveil.

The decision of the Court below does not accomplish uniformity for the three statutes. In footnote 12 of the Court's opinion, the Court states:

> Whatever the merits of Western's theory of preclusion, the argument is flawed by the erroneous assumption, that the § 4061(a) definition of 'highway vehicle' controls interpretation of that term under the special fuels and highway use taxes.

This statement directly conflicts with the stated purpose of uniformity of the Regulations that the Court below sustained.

III.

The decision of the Court of Appeals is contrary to prior decisions of two other Courts of Appeals, and to a prior decision of the Court of Appeals for the Fifth Circuit itself.

The decision of the Court below conflicts with the prior decisions of the Second Circuit in *Allied Bitumens* and the Tenth Circuit in *Stafford Well Service*. The full texts of these two opinions are reproduced in the Appendix at pages A-50 and A-55, respectively.

This and the two prior cases involve Code Sections 4481 and 4482. *Allied* and *Stafford* held that the vehicles at issue were non-highway vehicles because they were not primarily designed for use on the public highway. Those cases cannot be meaningfully distinguished from this case, which rejects the "primary design" test. The Court of Appeals below effectively

acknowledged in its opinion (Appendix A-28) the conflict with *Stafford* by referring to it as a "departure from the prevailing interpretation," without offering any factual distinction.

The definition of a "highway vehicle" in the statutes was not amended before 1977 when the Treasury imposed the tax against Western because of the new Regulations. The Court below held that the primary design test incorporated into Question Number 1 of the jury verdict was no longer the correct interpretation of the tax statutes. Rather, the Appeals Court below held that the proper standard was the modified Regulations contained in Question Number 2 submitted to the jury. The only explanation for this result is that the amendment of the Regulations amended the statutes. That explanation is unacceptable for the reasons set forth above in this Petition.

None of the criteria contained in Question Number 2 based upon the new Regulations is contained in the opinion of either the Second or Tenth Circuit cases. There is no statutory basis for the opposite result in this case. The jury in the District Court below made the factual determination that the vehicles were not highway vehicles under the statute as construed by the Second and Tenth Circuits, and as construed by the Fifth Circuit in the *Big Three Industrial Gas & Equipment* case, with all of which decisions the decision below conflicts.

IV.

Equality and fairness in taxation call for a non-highway classification for Western's vehicles.

Another reason to grant this writ is the "equality doctrine" of *International Business Machines Corporation v. United States*, 343 F.2d 914 (Ct. Cl. 1965), with which the decision below conflicts. Plaintiff ("IBM") recovered excise taxes because a competitor, Remington Rand, was not required to

pay the excise tax for the same period (1952 to 1958) on a similar machine that competed with an IBM machine that was taxed by the Internal Revenue Service (referred to in this Petition as the "IRS"). IBM filed a request for a ruling when it learned that the IRS had issued Remington a ruling that Remington's machines were not taxable. The IRS delayed for over 2 years before rejecting IBM's request. Later the IRS revoked Remington's ruling prospectively and began to tax both IBM and Remington.

The Court rejected the government's position that "taxpayers can never avoid liability for a proper tax by showing that others have been treated generously, leniently or erroneously by the Internal Revenue Service." Where, as here, Congress has directed equal treatment, the Court of Claims held that Courts are bound to vindicate that equality, where no rational basis has been advanced for treating taxpayers differently. 343 F.2d at 920.

In this case, the IRS issued a favorable (the vehicles were not highway vehicles and were not taxable) private letter ruling to Transport Systems, Inc. with respect to vehicles built for Western, but denied Western's request for a similar determination.

Presumably, the IRS is not taxing the NOWSCO units litigated in the *Big Three* case, which units compete with Western's vehicles at issue.

Western does not rely on the Transport Systems ruling as a governing legal precedent. Rather, it is the fact of inconsistent and unequal treatment of competing taxpayers that is an independent basis for reversing the Court of Appeal's decision in this case.

CONCLUSION

In order to determine the powers of the executive branch of government relative to the powers of the judicial and legislative branches of government with respect to the application of the federal tax statutes, and in order to resolve the conflict among the decisions of the Second, Tenth and Fifth Circuit Courts of Appeals, this Court should grant the requested writ.

For all of the foregoing reasons, petitioner asks that a writ of certiorari issue to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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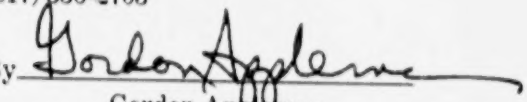
By 
Gordon Appleman

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I do hereby certify that three true and correct copies of the foregoing petition were forwarded by certified mail, return receipt requested, with first class postage prepaid, to counsel of record:

Michael L. Roach, Esquire
Attorney
Tax Division
Department of Justice
Washington, D.C. 20530

and also to the

Solicitor General
Department of Justice
Washington, D.C. 20530

SIGNED this 2d day of August, 1983.

Gordon Appleman

Gordon Appleman

APPENDIX

Page

Opinions Below

Regulations & Statutes

APPENDIX (Continued)

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Cases

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4-78-430K

THE WESTERN COMPANY OF NORTH AMERICA,
ET AL, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

VERDICT

LADIES AND GENTLEMEN OF THE JURY:

This is somewhat unusual and you should not concern yourselves as to what the reason may be, but the first two questions you are to answer are about the same subject matter. Each question is in slightly different form, and each has a different explanatory instruction or test.

You must answer each question independently of the other and you must use only the instruction given in connection with each question.

In applying the instruction or test, you should use reason and common sense.

QUESTION NUMBER 1

Do you find from a preponderance of the evidence that any or all of Plaintiff's vehicles or vehicle groups hereinafter listed are primarily designed or predominantly adapted for use as non-highway vehicles, even though incidental highway use may occur?

In answering this question you are instructed that the legal test to determine if a vehicle is a non-highway, or off-highway vehicle is:

> whether the vehicle is designed or adapted for purposes primarily or predominantly other than for the transportation of persons or property on the highway, even though incidental highway use may occur.

"Primarily" or "predominantly" means "first" or "major" rather than "solely" or "only." So that in this case if you find that the major or first consideration in the design or adaptation of the units is for purposes other than transportation of persons or property over the highway, you may find that such units are non-highway units.

You will answer this question by writing "highway vehicle" or "non-highway vehicle" in the space provided by each vehicle or vehicle group hereinafter listed.

(1) Body Load units (including Fracmasters, Blenders, Pressure Masters, Slurry Mixers, Slurry Accumixers, Acid Masters and Slurry Masters)

(1) Non-Highway Vehicle

(2) GP Tractor without Blower or Winch

(2) Highway Vehicle

(3) GP Tractor with Blower or Winch

(3) Highway Vehicle

(4) Trailer Mounted:

(a) Equipment only: Fracmasters, Acid Masters, Acid Frac and Slurry Master.

(4a) Non-Highway Vehicle

(b) Cement Air Can & Sand Air Can

(4b) Highway Vehicle

(c) 5000 Gallon Acid Transport

(4c) Highway Vehicle

(d) Sand Dump Trailer

(4d) Highway Vehicle

(5) Sand Dump Truck

(5) Highway Vehicle

(6) Line Truck

(6) Highway Vehicle

QUESTION NUMBER 2

Do you find from a preponderance of the evidence that any of Plaintiff's vehicles or vehicle groups hereinafter listed does not fall within the general description of "highway vehicles" as hereinafter defined?

In connection with this question you are instructed that the term "highway vehicle" means any self-propelled vehicle, or any trailer or semi-trailer designed to perform a function of transporting a load over public highways, whether or not the vehicle is also designed to perform other functions.

The terms used in the general definition above are defined as follows:

> A "vehicle" consists of a chassis, or a chassis and body, if the vehicle has a body, but the term "vehicle" does not include the vehicle's load. Therefore, in determining whether a vehicle is a "highway vehicle," it makes no difference that a vehicle is designed to transport only one particular kind of load over the highway, such as a special type of cargo, or machinery, specially designed to perform some off-highway task. In the case where the vehicle's load is special machinery or equipment, it also does not matter that the machinery or equipment is perma-

nently mounted on the vehicle. In other words, a vehicle designed to transport over the public highway special machinery or equipment which is permanently mounted on the vehicle is still a highway vehicle, unless it meets one of the exceptions which will be explained in a later question.

The term "transport" also includes the term "tow."

The term "public highway" includes any road (whether federal, state, city or otherwise) in the United States which is not a private roadway.

You will answer this question by writing in the space provided by each vehicle or vehicle group hereinafter listed the term "highway vehicle" or "non-highway vehicle" as you so find.

(1) Body Load units (including Fracmasters, Blenders, Pressure Masters, Slurry Mixers, Slurry Accumixers, Acid Masters and Slurry Masters)

(1) Highway Vehicle

(2) GP Tractor without Blower or Winch

(2) Highway Vehicle

(3) GP Tractor with Blower or Winch

(3) Highway Vehicle

(4) Trailer Mounted:

(a) Equipment only: Fracmasters, Acid Masters, Acid Frac and Slurry Master.

(4a) Highway Vehicle

(b) Cement Air Can & Sand Air Can

(4b) Highway Vehicle

(c) 5000 Gallon Acid Transport

(4c) Highway Vehicle

(d) Sand Dump Trailer

(4d) Highway Vehicle

(5) Sand Dump Truck

(5) Highway Vehicle

(6) Line Truck

(6) Highway Vehicle

QUESTION NUMBER 2(a)

If you have found that one or more or all of Plaintiff's vehicles or vehicle groups were "highway vehicles" in your answer to Question 2, such vehicles would be excepted from being "highway vehicles" and would not be highway vehicles if you find such vehicles are designed to serve only as a mobile carriage and mount for particular machinery or equipment for non-transportation functions.

In considering this exception to the general definition of highway vehicles, you should note that it applies to specially designed mobile machinery which performs some operation at the well-site.

There are three tests (A), (B), and (C), all of which must be met before a vehicle satisfies this exception and in applying the tests, you should use reason and common sense. The tests are as follows:

> A self-propelled vehicle, or trailer, or semi-trailer is not a highway vehicle if,
>
> (A) it consists of a chassis to which there has been permanently mounted (by welding, bolting, riveting, or other means) machinery or equipment to perform construction, mining, drilling, or similar operations, if the operation of the machinery or equipment is unrelated to transportation on or off the public highways;

(B) the chassis has been specially designed to serve only as a mobile carriage and mount (and a power source, where applicable) for the particular machinery or equipment involved, whether or not the machinery is in operation; and

(C) by reason of special design, such chassis could not, without substantial structural modification, be used as a component of a vehicle designed to perform a function of transporting any load other than that particular machinery or equipment, or similar machinery or equipment requiring such a specially designed chassis.

In making your determination of whether Plaintiff's vehicles are like vehicles described in the preceding paragraph, you may consider whether the chassis are constructed of heavy-duty high tensile steel frames, whether they have been reinforced by adding fish-plating and cross-members to support heavier machinery components, whether the vehicles have standard running gear and/or special drive trains, whether the chassis had specially designed sub-frames, and whether machinery is mounted on the sub-frames.

Bearing in mind the foregoing explanation, please answer the following question.

Do you find that any vehicle hereinafter listed is not a highway vehicle because it meets each of the three tests (A), (B), and (C), of the exception of the definition of highway vehicle for "specially designed mobile machinery"?

In answering this question you will write in the space provided by each vehicle "highway vehicle" or "non-highway vehicle" as you so find.

(1) Body Load units (including Fracmasters, Blenders, Pressure Masters, Slurry Mixers, Slurry Accumixers, Acid Masters and Slurry Masters)

Highway Vehicle

(2) GP Tractor without Blower or Winch

Highway Vehicle

(3) GP Tractor with Blower or Winch

Highway Vehicle

(4) Trailer Mounted:

(a) Equipment only: Fracmasters, Acid Masters, Acid Frac and Slurry Master.

(4a) Highway Vehicle

(b) Cement Air Can & Sand Air Can

(4b) Highway Vehicle

(c) 5000 Gallon Acid Transport

(4c) Highway Vehicle

(d) Sand Dump Trailer

(4d) Highway Vehicle

(5) Sand Dump Truck

(5) Highway Vehicle

(6) Line Truck

(6) Highway Vehicle

QUESTION NUMBER 2(b)

If you have found that one or more, or all, of Plaintiff's vehicles or groups of vehicles are "highway vehicles" in your answer to Question Number 2, there is a second exception, independent of the exception set forth in Question Number 2(a). This second exception involves vehicles specially designed for off-highway transportation. There are two tests (A) and (B), both of which must be met before a vehicle comes within this second exception to the general definition highway vehicles. In applying these tests you should use reason and common sense. You will note this exception involves not only the chassis, but the entire vehicle.

A self-propelled vehicle, or a trailer or semi-trailer, is not a highway vehicle if

> (A) it is specially designed for the primary function of transporting a particular type of load other than over the public highway in connection with the construction, mining, drilling, or similar operations; and
>
> (B) by reason of such special design, the use of such vehicle to transport its particular load over the public highway is substantially limited or substantially impaired.

For the purpose of applying test (B) of this second exception you may take into account whether the vehicle may travel at regular highway speeds, requires a special permit for highway use, is overweight, overheight, or overwidth for regular highway use, and any other considerations which you believe are substantial limitations or substantial impairments in traveling over the public highways.

Also, when you are determining whether a vehicle comes within this off-highway transportation exception, any equipment which is attached to the vehicle used for loading, unloading, storing, vending, handling, processing, preserving, or otherwise caring for a load transported by the vehicles over the public highways, is to be considered as related to the transportation of a load over the public highways even though such functions may be performed off the public highways.

In considering this exception, you should note that it applies to a vehicle designed for transportation of a load to the well-site.

Bearing in mind the foregoing explanation, please answer the following question.

Do you find that any vehicle hereinafter listed is not a highway vehicle because it meets each of the two tests (A) and (B) of the exception of the definition of highway vehicles for "vehicles specially designed for off-highway transportation"?

In answering this question you will write the term "highway vehicle" or "non-highway vehicle" in the space provided by each vehicle as you so find.

(1) Body Load units (including Fracmasters, Blenders, Pressure Masters, Slurry Mixers, Slurry Accumixers, Acid Masters and Slurry Masters)

Highway Vehicle

(2) GP Tractor without Blower or Winch

Highway Vehicle

(3) GP Tractor with Blower or Winch

Highway Vehicle

(4) Trailer Mounted:

(a) Equipment only: Fracmasters, Acid Masters, Acid Frac and Slurry Master.

(4a) Highway Vehicle

(b) Cement Air Can & Sand Air Can

(4b) Highway Vehicle

(c) 5000 Gallon Acid Transport

(4c) Highway Vehicle

(d) Sand Dump Trailer

(4d) Highway Vehicle

(5) Sand Dump Truck

(5) Highway Vehicle

(6) Line Truck

(6) Highway Vehicle

QUESTION NUMBER 3

If in your answer to Question 1 or Question 2, you have found either Group 2 and/or Group 3 of the GP tractor to be "highway vehicles" and if you have found any of the trailers in

Group 4 to be "non-highway vehicles" in any of your answers, then answer the following question:

> In connection with the following question, you are instructed that the word "component" as used therein, means a constituent part of the whole. In this context a tractor in order to be a component part of a "tractor-trailer" combination, must be designed to be permanently attached to a particular trailer, even though incidental separation may occur on occasion without the fault of the Western Company.
>
> You are further instructed that a vehicle which is not a highway vehicle is not subject to excise taxes. Likewise, a chassis, even though when viewed by itself may be taxable, when used as a component part of a vehicle which is not a highway vehicle, is not taxable.

Do you find from a preponderance of the evidence that the tractors to which the non-highway trailers have been attached are component parts of such "non-highway vehicles"?

Answer in the place provided by writing "they are component parts" or "they are not component parts."

Answer: *They Are Not Component Parts.*

We, the jury, have answered the above and foregoing questions as herein indicated and herewith return same into court as our verdict.

DATE 2-20-81 FOREPERSON /s/ _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4-78-430K

WESTERN COMPANY OF NORTH AMERICA,
ET AL, Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable David O. Belew, Jr., District Judge, presiding, and the issues having been duly heard, and a Verdict entered by the jury on February 20, 1981, and in accordance with such Verdict,

IT IS HEREBY ORDERED that the Plaintiff, Western Company of North America have Judgment against the Defendant, United States of America, for refund of Highway Use Taxes in the amount of $79,358.00 and for refund of Special Fuels Taxes in the amount of $112,069.08, for the periods 1971-1977 in the total amount of $191,427.08, together with interest thereon according to law.

FURTHER, IT IS ORDERED that Defendant, United States of America, have Judgment against the Plaintiff, Western Company of North America, on its counterclaim in the amount of $16,040.20, together with interest thereon according to law.

Costs herein are taxed against the Defendant.

ENTERED this 5 day of March, 1981.

/s/ David O. Belew, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4-78-430K

WESTERN COMPANY OF NORTH AMERICA,
ET AL, Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant.

AMENDED JUDGMENT

This action came on for trial before the Court and a jury, the Honorable David O. Belew, Jr., District Judge, presiding, and the issues having been duly heard, and a Verdict entered by the jury on February 20, 1981, and in accordance with such Verdict,

IT IS HEREBY ORDERED that the Plaintiff, Western Company of North America have Judgment against the Defendant, United States of America, for refund of Highway Use Taxes in the amount of $90,563.73 and for refund of Special Fuels Taxes in the amount of $117,445.00, for the periods 1971-1977 in the total amount of $200,008.73, together with interest thereon according to law.

FURTHER, IT IS ORDERED that Defendant, United States of America, have Judgment against the Plaintiff, Western Company of North America, on its counterclaim in the amount of $16,040.20, together with interest thereon according to law.

Costs herein are taxed against the Defendant.

ENTERED this 19 day of June, 1981.

/s/ David O. Belew, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

March 4, 1983.

No. 81-1397

WESTERN COMPANY OF NORTH AMERICA, J & L Tank, Inc., Grayco Electrical, Inc. and Aggregate Plant Products Company, Plaintiffs-Appellees

vs.

UNITED STATES OF AMERICA, Defendant-Appellant.

OPINION

Appeal from the United States District Court for the Northern District of Texas.

Before THORNBERRY, JOHNSON and HIGGINBOTHAM Circuit Judges.

JOHNSON, Circuit Judge:

Western Company of North America won a refund of $208,008.73 in special fuels and highway use excise taxes assessed on certain of its vehicles for the taxable period 1971 through 1977. The Government appeals, contending that the district court erred in refusing to apply a regulation promulgated in 1977 to the determination of Western's 1977 tax liability, and in refusing to hold a hearing on a post-verdict dispute regarding the taxability of certain hybrid vehicles. We agree that the district court erred in its apparent determination that the 1977 regulation was invalid because a different, prior interpretation had attained the force of law, and remand for entry of judgment in favor of the Government for the taxing period 1977. We find no error in the district court's decision

to resolve the post-verdict dispute on the record developed at trial.

I.

Section 4041(a) of the Internal Revenue Code of 1954 imposes a special fuel excise tax of four cents per gallon on any liquid sold or used as fuel in a "diesel-powered highway vehicle." 26 U.S.C. § 4041(a). Section 4481(a) of the Code imposes a highway use excise tax on any "highway motor vehicle" with a gross weight of more than 26,000 pounds. The dispute between Western Company and the United States centers on whether certain specialized equipment-bearing trucks and trailer chassis are "highway vehicles," and thus taxable, within the meaning of sections 4041(a) and 4481(a).

Western is a corporation in the business of providing specialized services needed in drilling and operating oil and gas wells. Western's services consist primarily of cementing,[1] acidizing,[2] and fracturing[3] wells at the well sites. These functions are performed by specialized cement, acid and sand-and-water high pressure pumping machines, known as "slurry-masters," "acidmasters," and "fracmasters." The pumping units are serviced by additional specialized equipment designed to blend the cement and sand mixtures ("slurry mixers" and "blenders"), to transport the necessary dry cement, acid and sand, to pneumatically transfer these supplies from transports to storage units and to transport and unload high pressure pipe at the job sites.

The nature of Western's work demands that its equipment be mobile. The machinery is kept at district offices and dispatched, as needed, to well servicing jobs one hundred miles or more from the offices. The equipment stays on the job site for a few hours or days and is then moved onto another job or returned to the district office. To facilitate movement of the equipment, Western mounts each unit, by welding or bolting, on a truck chassis or trailer. Special capabilities are required

of these equipment-bearing chassis and trailers, as well as of Western's various tractors, transports, and other trucks, by virtue of the geographic dispersion of Western's customers and the relative inaccessability of many of the well sites. About eighty percent of the average 21,841 miles annually logged by Western's service vehicles is over public highways. But many job sites are remotely situated, and can be reached only by traveling substantial distances over often rocky, muddy, uneven private roads. To meet these demands, Western's chassis and trailers are designed to be able both to travel public highways at sustained speeds with reasonable economy of operation, and to traverse difficult terrain and unimproved private roads.

The truck chassis and trailers are built by various manufacturers to Western's engineering specifications. Western's design incorporates the compromises necessary to satisfy the requisites of highway driving and off-road use. Most of Western's vehicles are equipped with a 16-speed Spencer transmission, providing high torque at low speeds, as well as the range necessary for highway operation. The vehicles' Michelin XYZ radial tires, while not providing the high traction and damage resistance of all-terrain tires designed for off-highway use, do provide a good service life on the highway and more traction than a normal highway tire in sand and loose soil, without the danger of failure due to overheating at sustained highway speeds posed by all-terrain tires. Other features, such as special frame supports and cross-member reinforcements, tandem front axles, and heavy-duty suspension systems, make the vehicles heavier and more expensive than similar commercial vehicles, thereby limiting their payload and increasing their operating costs as compared with exclusively highway vehicles. These features are, however, commonly found in heavy-duty highway trucks. Finally, the vehicles are in most cases engineered to incorporate the off-highway use features into designs acceptable for highway use without special per-

mit. The delays and travel restrictions imposed on the movement of equipment with special permit are thereby avoided.

The issue of the taxability of Western's vehicles was tried to a jury. Western contended at trial that its vehicles were exempt from the special fuel and highway use excise taxes under a long-standing interpretation of the term "highway vehicle" as used in the manufacturer's excise tax, § 4061(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 4061(a). Under that interpretation, vehicles are not taxable if "primarily designed" or "predominantly adapted" for use as nonhighway vehicles, even though incidental highway use may occur. Treas.Reg. 46, § 316.50, T.D. 4998, 1940-2 C.B. 300; Rev.Rul. 57-440, 1957-2 C.B. 721; *modified* Treas.Reg. § 48.4061(a)-1, T.D. 6648, 1963-1 C.B. 197. Western argued that judicial applications of the primary design standard to oil well servicing vehicles had consistently resulted in findings that the vehicles were not taxable because their design had been controlled by the demands of their specialized functions and off-road usage, *see Big Three Industrial Case & Equipment Co. v. United States*, 329 F.Supp. 1273 (S.D.Tex.1971), *aff'd per curiam*, 459 F.2d 1042 (5th Cir.1972); *Otis Engineering Corp. v. United States*, 376 F.Supp. 109 (N.D.Tex.1974); *compare Frank Hrubetz & Co. v. United States*, 412 F. Supp. 1033 (D.Or.1973), *aff'd on district court opinion*, 542 F.2d 512 (9th Cir.1976) *and Central Engineering Co. v. United States*, 306 F.Supp. 667 (E.D.Wis.1969); *contra* Rev.Rul. 66-61, 1960-2 C.B. 250, *superseded* Rev.Rul. 80-353, 1980-2 C.B. 309.

The Government denied that Western's vehicles were exempt under that standard; in addition, it argued that a definition of "highway vehicle" contained in Treasury Regulations promulgated January 13, 1977, 42 Fed.Reg. 2672, T.D. 7461 1977-1 C.B. 317 *promulgating* Treas.Reg. on Excise Tax on Use of Certain Highway Motor Vehicles, § 41.4482(a)-1 (26 C.F.R.) and Treas.Reg. on Manufacturers and Retailers Excise Tax, § 48.4041-7 (26 C.F.R.) *incorporating by refer-*

ence Treas.Reg. on Manufacturers and Retailers Excise Tax, § 48.4061(a)-1 (26 C.F.R.), superseded all prior interpretations of the term "highway vehicle" and governed the tax status of Western's vehicles for at least the taxing period 1977.[4] The new regulation defined a "highway vehicle" as "any self-propelled vehicle, or any trailer or semi-trailer, designed to perform a function of transporting a load over public highways whether or not also designed to perform other functions," 26 C.F.R. § 48.4061(a)-1(d).[5] Vehicles meeting that standard might nonetheless be exempted from taxation if their chassis were designed to carry specialized equipment and could not, without substantial structural modification, be used in another function, Treas.Reg. § 48.4061(a)-1(d)(i), or if their chassis were specially designed for an off-highway transportation function and that special design substantially limited or impaired public highway use, Treas.Reg. § 48.4061(a)-1(d)(ii). The Government claimed that Western's vehicles fell within the 1977 regulation's definition of highway vehicle, and qualified under neither exception.

Western countered by claiming that the 1977 regulation was invalid because the long-standing judicial and administrative interpretation of the term "highway vehicle" under the narrower "primary design" test had attained the force of law through implicit congressional approval by amendments and re-enactments of the underlying statutes. Finally, Western rounded out its position by claiming that even if the new regulation applied, its vehicles qualified under two of the exemptions from taxation set out in the new regulation.

The district court wisely refrained from resolving this dispute before sending the case to the jury. Instead, it asked that the jury apply each standard in turn to the nine categories of vehicles identified by the parties.[6] The jury decided in Special Interrogatory 1 that under the pre-1977 regulation test, all of Western's vehicles except the truck and trailer chassis bearing pressurized pumping and mixing equipment were taxable.

In Special Interrogatory 2, it found all vehicles to be taxable under the standards set out in the 1977 regulation. The district court, in an apparent but unstated determination that the 1977 regulation was invalid because the primary design test had, as Western contended, attained the force of law, entered judgment[7] refunding the excise tax paid on the specialized equipment-bearing vehicles for all taxing periods from 1971 through 1977.

After judgment was entered, the Government moved to amend it on the ground that about fifty of Western's specialized-equipment bearing vehicles were equipped with a fifth wheel, enabling them to be used to tow a trailer, and were thus more properly categorized as taxable trailers.[8] The district court denied the Government's motion for a hearing on the matter and refused to reclassify the vehicles. The Government appeals the district court's denial of a hearing on the post-verdict dispute and its implicit invalidation of the 1977 regulation.

II.

Western defends the district court's decision to apply the pre-1977 regulation primary design test to evaluation of its 1977 tax liability on a theory of preclusion of change in the administrative interpretation of "highway vehicle" by legislative approval of the pre-existing standard. The argument derives principally from the history of administrative and judicial interpretation of the term "highway vehicle" as used, not in the special fuels and highway use excise taxes in issue, but in the excise tax levied on manufacturers of motor vehicles, I.R.C. § 4061(a). Western claims that the manufacturers' excise tax, since the time of its original imposition by the 1917 Revenue Act, Pub.L. No. 65-50, § 600, 40 Stat. 316, consistently has been construed to reach only those vehicles designed primarily for highway transportation. Then, imputing awareness of the longstanding construction of the term

under the manufacturers' excise tax to the Congress, Western asserts that the Congress' failure to modify that definition throughout the course of frequent amendments to and re-enactments of the excise tax acts constituted tacit approval of the interpretation, elevating it to the stature of positive law beyond all but legislative modification.

We differ with Western on two critical points. First, we emphasize that the question before us is of the validity of the 1977 regulation's definition of "highway vehicle" as applied under the special fuel and highway use excise taxes. Examination of the history of administrative and judicial interpretation of the term under the special fuels and highway use taxes discloses that a construction different from the primary design test prevailed under those statutes from the time of initial administrative consideration. Second, and more importantly, we find nothing in the sparse legislative history of the amendments and re-enactments of the three statutes to indicate that the Congress has considered and approved any particular interpretation of the term.

A.

The special fuels tax first appeared in 1951 as a "tax of two cents a gallon upon any liquid . . . sold . . . to an owner . . . of a diesel-powered highway vehicle for use as a fuel in such vehicle." Act of October 20, 1951, Pub.L. No. 82-183, Tit. IV § 441(a), 65 Stat. 523 (now I.R.C. § 4041(a)). It survives unchanged, save for a doubling in the tax rate, in the current version of the Code. I.R.C. § 4041(a).[9]

A definition of the term "highway vehicle" was included in the original regulations promulgated under the Act. Section 324.10(c) of Regulations 119 stated:

> The term "diesel-powered highway vehicle" has reference to the type of vehicle and not to the use which is made of the vehicle. The term includes any vehicle pow-

> ered or propelled by a diesel motor or engine and of the type which is capable of general use upon public highways, such as automobile trucks, busses, highway tractors, etc. The term does not, however, include equipment designed primarily for off-highway use, such as road graders, bulldozers, power shovels, earth movers, farm tractors, etc.

18 Fed.Reg. 63. Section 324.21(a) of Regulations 119 amplified the definitional distinctions.

> The tax imposed by clause (1) of section 2450 of the Code applies to the sale of any taxable liquid to an owner, lessee, or other operator of a diesel-powered highway vehicle for use as a fuel in such a vehicle. It is immaterial whether the vehicle is actually employed in highway or off-highway use.
>
> *Example.* The M Corporation is engaged in the construction of a power dam at a site removed from all public highways. Part of its construction equipment consists of diesel-powered shovels, bulldozers, and highway type dump trucks. The diesel fuel used in the highway type dump trucks is subject to tax even though such trucks are operated entirely within the bounds of the construction project. No tax is payable with respect to the diesel fuel used in the power shovels and bulldozers since none of this equipment is a vehicle which may be operated in general use over a public highway.

This interpretation drew the limits of the term "highway vehicle" to exclude only those vehicles the mobility of which was essential to their designed, off-highway functions; all others whose mobility was compatible with public highway use were deemed taxable. The original regulation was made applicable to the Internal Revenue Code of 1954 by T.D. 6091, 1954-2 C.B. 47. It stood until replaced with an expanded version in

1960. Treas.Reg. § 48.4041-7(b), T.D. 6505, 1960-2 C.B. 291 stated:

> (b) *Highway vehicle.* — The term "highway vehicle" has reference to the type of vehicle and not to the use which is made of the vehicle. The term means any motor vehicle, whether powered by diesel fuel or special motor fuel which is of the type used for transportation on the highways. It includes automobile trucks, busses, highway tractors, trolley buses, and other similar type vehicles. The term "highway vehicle" does not include any vehicle, which, although propelled by means of its own motor, is of a type not used for highway transportation, that is, of a type designed and manufactured for a purpose other than highway transportation. For example, vehicles such as earth movers, power shovels, trench diggers, and bulldozers, which are designed and manufactured as self-propelled units for "off-the-road" operations, are not highway vehicles. Neither are such motorized vehicles as road graders or rollers, which are designed and manufactured for construction or maintenance of roads, considered to be highway vehicles. The same is true of farm tractors, cotton pickers, and other motorized agricultural implements of a similar nature. However, the fact that equipment or machinery having a specialized use (as for example, an air compressor, crane, or specialized oil-field machinery) is mounted on a vehicle which, apart from such equipment or machinery, is of a type used for highway transportation will not remove such vehicle from classification as a highway vehicle.

The new version maintained the previously enunciated limits on the concept of "highway vehicle," and re-emphasized that the highway-worthiness of a vehicle's design, apart from its coordinate use to carry specialized equipment to off-highway destinations, rendered the vehicle subject to taxation. Intermittent amendments of the 1960 regulation reinforced the

Service's stated conclusion that vehicles designed to function both on the highway and off attracted the special fuels tax. T.D. 6881 ¶ 2, 1966-1 C.B. 247 modified the regulation clearly to exclude from taxation fuel used by mobile, specialized equipment in the performance of its specialized function while immobilized; the point was illustrated by a hypothetical dealing with a derrick mast-carrying oil well servicing vehicle.[10] *Accord*, T.D. 7071, 1970-2 C.B. 257. But the definition of "highway vehicle" set out by that regulation remained in significant aspects unchanged until promulgation of the 1977 version Western challenges.

A similar history, and interpretation, developed around the highway use tax. That tax was first levied in 1956 "on the use of any highway motor vehicle which . . . has a taxable gross weight of more than 26,000 pounds." Act of June 29, 1956, Tit. II § 206(a), 70 Stat. 389 (codified at I.R.C. § 4481(a)). The following section defined "highway motor vehicle" as "any motor vehicle which is a highway vehicle," *id.* (codified at I.R.C. § 4482(a)). Like the special fuels tax, the highway use levy has been substantially modified only by a doubling of the tax rate. Act of June 29, 1961, Pub.L. No. 87-61, Tit. II § 203(a), 75 Stat. 124. Its altogether unenlightening definition of "highway motor vehicle" has not been modified at all.[11]

The initial explication of its use of the term "highway motor vehicle" was set out in Treas.Reg. 41.4482(a)-1, T.D. 6216, 1956-2 C.B. 900-01.

> (c) *Highway vehicle.* — The term "highway motor vehicle" does not include any vehicle which, although propelled by means of its own motor, is of a type not used for highway transportation, that is, of a type designed and manufactured for a purpose other than highway transportation. For example, vehicles such as earth movers, trench diggers, and bulldozers, which are designed and manufactured as self-propelled units for "off-the-road" operations, are not highway motor vehicles for purposes

> of the regulations in this part. Neither are such motorized vehicles as road graders or rollers, which are designed and manufactured for construction or maintenance of roads, considered to be highway motor vehicles. The same is true of farm tractors, cotton pickers, and other motorized agricultural implements of a similar nature. However, the fact that equipment or machinery having a specialized use (as for example, an air compressor, crane, or specialized oil-field machinery) is mounted on a vehicle which, apart from such equipment or machinery, is of a type used for highway transportation will not remove such vehicle from classification as a highway motor vehicle.

The interpretation was in all significant aspects identical to that developed under I.R.C. § 4041(a). It, too, excluded from the concept of "highway vehicle" those vehicles whose mobility was directly used in the performance of their designed, off-highway functions; it included vehicles designed to transport nonmobile special purpose equipment to off-highway work sites. Revenue Rulings applying the statute made clear the Service's position that taxable status extended to vehicles engineered especially to carry specialized equipment over the public highways from one off-highway job site to another. Rev.Rul. 69-340, 1961-1 [sic] C.B. 291 stated:

> Advice has been requested whether the motor vehicle described below constitutes a "highway motor vehicle" for purposes of the highway use tax imposed by section 4481 of the Internal Revenue Code of 1954.
>
> A certain self-propelled motor vehicle is designed and constructed to transport specialized oilfield equipment and machinery over the highway from one job site to another. The equipment and machinery are mounted on the vehicle so as to become integral parts thereof, but the mobility of the vehicle is not directly utilized in the performance of the function of the machinery and equip-

ment. Because of the vehicle's specific design features and characteristics, if the equipment and machinery were removed the vehicle would not be suitable for any other highway transportation purpose. Nevertheless, providing mobility over the highway for the machinery and equipment is the most significant reason for construction of the entire vehicle as a piece of unitized equipment and this mobility clearly enhances the economic utility of the machinery and equipment thereon by making available a broader geographic use of the specialized equipment.

* * * * * *

The broad intent of Congress in enacting the highway use tax on trucks was to tax vehicles exceeding a certain weight that are designed to transport a load over the highways. The regulation quoted above, read in its full context, carries into effect this intention of Congress by carving out from the tax only those vehicles clearly designed for off-highway use. The last sentence of the regulation sets forth the complementary rule where specialized equipment is mounted on a vehicle designed for highway purposes. Such equipment would be mounted on what might normally be considered the conventional type of truck chassis. The sentence is not meant to be, nor should it be, narrowly construed as excluding from the tax other vehicles not wholly conventional in style but which are nevertheless designed to transport a load, albeit specialized in nature, over the highways.

Accordingly, a vehicle otherwise classifiable as a "highway motor vehicle" for purposes of the tax imposed by section 4481 of the Code, is not removed from such classification merely because the specialized machinery and equipment that it is designed and constructed to transport are such an integral part of the vehicle that its removal would cause the vehicle to be unsuitable for any other highway transportation purpose.

> Therefore, it is held that the motor vehicle described in this Revenue Ruling is a "highway motor vehicle" for purposes of the tax imposed by section 4481 of the Code.

Amplified, Rev.Rul. 70-589, 1970-2 C.B. 273 (giving Rev.Rul. 69-340 prospective application); *declared obsolete*, Rev.Rul. 78-231, 1971 [sic] C.B. 450. Rev.Rul. 61-173, 1961-2 C.B. 207 accorded highway vehicle status to water trucks used in highway construction when traveling public highways from one construction site to another. Rev.Rul. 70-57, 1970-1 C.B. 241 found taxable a truck required to use the public highways to move from one off-highway job site to another, notwithstanding that the truck's principal use was in off-highway transportation operations, and that its excessive size and weight limited it to restricted use under special permits when operated on the public highways. The construction of the term "highway vehicle" under I.R.C. § 4481(a) as announced and implemented by the 1956 regulation and subsequent Revenue Rulings, like the parallel definition under I.R.C. § 4041(a), stood until the promulgation of the new 1977 regulation.

The few judicial interpretations of I.R.C. § 4482(a) as interpreted by the 1956 regulation, while giving the tax a somewhat narrower incidence than that urged by Rev.Ruls. 61-173 and 70-57, were by and large consistent with the Service's interpretation. *Carl Nelson Logging Co. v. United States*, 281 F.Supp. 671, 674 (D.Idaho 1967) held that outsized and excessively heavy logging trucks which traveled only private roads and a Forest Development road, and which by their designs were "economically, legally, and practically prohibitive for highway use" were not taxable. The decision accords with the 1956 regulation's exclusion of vehicles "designed and manufactured for a purpose other than highway transportation," Treas.Reg. § 41.4482(a)-1(c) (superseded 1977).

Frank Rossi v. United States, 220 F.Supp. 694 (D.Me.1963) and *Allied Bitumens, Inc. v. United States*, 353 F.Supp. 1128

(W.D.N.Y.1973) considered the taxable status of highway construction vehicles. In both cases, the vehicles were used almost exclusively in off-highway road construction, traveling on public roads only very limited distances, at slow speeds and under travel restrictions from one construction site to another. *Rossi* and *Allied* concluded, the former in reliance on the legislative history, the latter on *Rossi* and the 1956 regulation, that the Congress intended the tax to extend to vehicles used for highway transportation, but not to those used for construction, *Rossi* at 696; *Allied* at 1130. Both cases held the road construction vehicles exempt. Rossi did find it "also significant," *id.*, that the vehicles would not be subject to the manufacturers' excise tax under the primary design-incidental highway use standard; that observation did not, however, displace its interpretation of section 4482(a) in light of the legislative purpose as the basis of its ruling, but gave only support by analogy. *Rossi* and *Allied*, in analysis and result, are consistent with Treas.Reg. § 41.4482(a)-1(c)'s specific exemption of vehicles designed for construction and maintenance of roads.

The sole departure from the prevailing interpretation occurred in *Stafford Well Service, Inc. v. United States*, 340 F.Supp. 657 (D.Wyo.1972). The *Stafford* court held that seven derrick tractor trucks used to carry the derricks from one oil well site to another, which trucks together were driven only 3455 miles during the year in question and which operated on the public highways under travel restrictions, were not highway vehicles. In reaching this conclusion, it gave controlling force to *Rossi's* comparative reference to the manufacturers' excise tax; *Stafford* specifically rejected the Government's dual use intepretation of I.R.C. § 4482(a) in favor of the primary design-incidental use test of I.R.C. § 4041(a).

[1] The interpretive history of I.R.C. §§ 4041(a) and 4482(a) shows that those statutes' use of the term "highway vehicle" was not consistently and continually interpreted by

incorporation of I.R.C. § 4061(a)'s primary design-incidental use test. To the contrary, the Service established a record of long adherence to a contemporaneous construction taxing vehicles designed for and capable of carrying specialized loads both over public highways and off-road. That a similar examination of the interpretive history of the manufacturers' excise tax might support Western's claim of a sixty-year long consensus on construction of its reference to "highway vehicles" by the primary design-incidental use test is, standing alone, beside the point. Whatever the pattern of interpretation of I.R.C. § 4041(a) [sic], its standard did not achieve dominance in construction of I.R.C. §§ 4061(a) [sic] and 4482(a). Western's argument that the primary design standard became positive law by sheer longevity fails at the threshold for the fallacy in its premise.[12]

The consensus Western claims would, of course, attain significance if the Congress had at some time considered and approved the primary design standard as an accurate assessment of its intended incidence of taxation under all three statutes, *see United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 102 S.Ct. 821, 830-31, 70 L.Ed.2d 792 (1982); *Rowan Co. v. United States*, 452 U.S. 247, 101 S.Ct. 2288, 2292-94, 68 L.Ed.2d 814 (1981); *Fribourg Navigation Co. v. Commissioner of Internal Revenue*, 383 U.S. 272, 86 S.Ct. 862, 869-70, 15 L.Ed.2d 751 (1966); *United States v. Leslie Salt Co.*, 350 U.S. 383, 76 S.Ct. 416, 421, 423-24, 100 L.Ed. 441 (1956); *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 75 S.Ct. 473, 477, 99 L.Ed. 483 (1955); *Helvering v. Reynolds*, 313 U.S. 428, 61 S.Ct. 971, 976-77, 85 L.Ed. 1438 (1941); *Association of American Railroads v. Interstate Commerce Commission*, 564 F.2d 486, 493-94 (D.C.Cir.1977). But Western conceded at oral argument that there is no such evidence of expressed congressional approval of that test under any of the statutes. The few brief references to "predominant" or "chief" use found in the legislative histories related either to distinction

between vehicles designed for highway use and farm use, H.R. 1860, 1939-1 C.B. 728, 776; 1941-2 C.B. 413-440; S.R. 324, 1965-2 C.B. 676-677, or to classification of interchangeable chassis at the car tax rate or the truck tax rate, *id.* at 693. The discussions shed no light on the tax status of vehicles designed to transport equipment or machinery across both public highways and private property.

Western's argument that the primary design standard attained the effect of law by legislative re-enactment fails in light of the absence of express congressional approval of that standard, and in light of the Service's long adherence to a different interpretation of the statutes at issue.[13] We turn to Western's alternative arguments in support of the judgment.

B.

Western has argued, almost in passing, that the jury's verdict under Special Interrogatory 2 is against the weight of the evidence. Western claims that its vehicles should have been found exempt under Treas.Reg. § 48.4061(a)-1(d)(2)(i) because the function of its vehicles' chassis can be changed only by substantial structural modification to the chassis, and under Treas.Reg. § 48.4061(a)-1(d)(2)(ii) because its highway use of the vehicles was substantially impaired by load limits, fuel economy, and other operating costs due to vehicular design.

[2] The standard for appellate review of a jury's verdict is exacting. The verdict must be upheld unless the facts and inferences point so strongly and so overwhelmingly in favor of one party that reasonable men could not arrive at any verdict to the contrary. If there is evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions, the jury function may not be invaded. *Fairley v. Am. Hoist & Derrick Co.*, 640 F.2d 679, 681 (5th Cir.1981); *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) *(en banc)*.

[3] The trial record provided adequate support for the jury's verdict. The evidence indicated that Western used the same chassis to carry sand dumping bodies, pumping equipment, and blending equipment. It also indicated that the vehicles were capable of achieving reasonable fuel ecomony in highway travel at speeds approximately ten miles an hour below those of ordinary highway vehicles, and of carrying loads of acid, sand, and cement reduced by seven percent to one-third from those of ordinary vehicles. The jury could reasonably conclude on this proof that Western's vehicles met the criteria for neither exemption. Its verdict will not be disturbed.

C.

Finally, Western argues that the "equality doctrine" of *International Business Machines Corp. v. United States*, 343 F.2d 914, 170 Ct.Cl. 357 (1965), *cert. denied*, 382 U.S. 1028, 86 S.Ct. 647, 15 L.Ed.2d 540 (1966) requires that the district court's decision be affirmed. *IBM* arose out of differential treatment of competitors both of which had sought private rulings from the IRS on the applicability of an excise tax to their computing devices. IBM's competitor, Remington Rand, secured a ruling exempting its computers from tax. Shortly thereafter, IBM requested a similar ruling. The IRS delayed action on IBM's request for two years, then refused its request *prospectively* and withdrew its prior private ruling to Remington. Its action effectively subjected IBM to tax during a period when its competitor was excused. The Court of Claims in a divided opinion held that under the circumstances of that case, the two competitors in the computer industry, one of which had received a ruling and the other of which had requested one promptly thereafter, were receiving different tax treatment under substantially the same facts and gave IBM the same relief as Remington had been granted.[14]

[4, 5] Western claims that its taxation under the special fuels and highway use taxes as interpreted by the 1977 regulation is similarly unfair because the manufacturer of its chassis secured a private letter ruling exempting those chassis from the manufacturers' excise tax under the same regulation. But we believe that *IBM* is not controlling here. Unlike IBM, which made every reasonable effort to obtain its own favorable private ruling, Western sought no ruling. To relieve Western of tax liability under the rubric of equal treatment would be tantamount to exending the private ruling granted its supplier to it. It is well established that a taxpayer must itself seek a ruling in order to claim the benefit of favorable treatment. It is not enough that a private ruling has been issued to one similarly situated. *Austin v. United States*, 611 F.2d 117, 120 (5th Cir.1980); *Rue R. Elston Co. v. United States*, 532 F.2d 1176, 1181 (8th Cir.1976); *Shakespeare Co. v. United States*, 389 F.2d 772, 777, 182 Ct.Cl. 119 (1968).

III.

[6] A post-verdict dispute arose under Special Interrogatory 1 over the proper classification of certain specialized equipment-bearing vehicles capable of towing other vehicles. The Government urged that they be categorized as taxable tractors; Western contended that they retained the characteristics of nontaxable special purpose vehicles. The district court resolved the issue in Western's favor on the basis of the record created at trial. The Government now argues that the district court erred in failing to hold a hearing on the matter.

We are hard pressed to see how the district court abused its discretion. Fed.R. Civ.P. 49(a) allows the district court to make a finding on an issue omitted from special interrogatories submitted to the jury if no party has demanded the inclusion of that issue in the jury verdict. The Government did not request amplification of the special interrogatories to identify the fifth wheel-equipped vehicles as an independent category.

It does not argue that the district court misapprehended the controlling legal standard, and it conceded at oral argument that adequate evidence had been presented to the jury to have enabled it, if asked, to return a verdict on the issue. All considerations pertinent to resolution of the dispute were before the court. The Government has not shown that the decisional process was significantly impaired by the district court's refusal to grant a hearing. The district court was well within its discretion in choosing not to reopen proceedings for further argument and additional evidence. *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 363 (5th Cir. 1978).

IV.

The district court's judgment in favor of Western for the taxing period 1977 is reversed and the case remanded for entry of judgment in favor of the Government for the taxing period 1977, in accordance with the jury's verdict under Special Interrogatory 2. The district court's refusal to hold a hearing on the post-verdict dispute is affirmed as a proper exercise of discretion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

FOOTNOTES

[1]Cementing is a process of pumping a cement slurry at high pressure into the space between the well casing and the wall of the hole, thereby bonding the casing to the rock.

[2]Acidizing is a stimulation treatment applied to new or reworked wells after completion in a producing formation to increase the amount of oil or gas coming into the well. In acidizing, a solution of 15% hydrochloric acid is pumped into a well which has been completed in a limestone or dolomite reservoir. The acid dissolves part of the rock, thereby increasing its permeability and stimulating a greater flow of oil or gas into the well.

[3]Fracturing is also a production enhancement treatment. It involves pumping water or another liquid mixed with sand into the well at pressures up

to 20,000 pounds Psi. The pressure forces open fractures in the reservoir rocks thereby permitting a greater amount of oil or gas to reach the well.

[4]Under the amended regulations, the new definition was to apply retroactively, unless the taxpayer elected to apply the prior rules to an issue involving the definition of a "highway vehicle" for periods prior to 1977 and the prior rules "unequivocally resolve[d]" the dispute over the taxability of the vehicles. Treas.Reg. on Manufacturers and Retailers Excise Tax, § 48.4061(a)-1(d)(3), *post* note 5. At trial, the Government argued that the prior rules did not unequivocally resolve the dispute and requested application of the 1977 regulations to the entire period in question. The district court implicitly rejected the Government's nonelection argument by its application pre-1977 interpretations of "highway vehicle" to all periods in issue. The Government does not appeal the question of the retroactive application of the regulations. Its challenge is restricted to the applicability of the 1977 regulations to the 1977 taxing period.

[5]Treas.Reg. on Manufacturers and Retailers Excise Tax, § 48.4061(a)-1(d) states in full:

(d) Highway Vehicle. (1) Definition. For purposes of this subchapter, the term "highway vehicle" means any self-propelled vehicle, or any trailer or semitrailer, designed to perform a function of transporting a load over public highways, whether or not also designed to perform other functions, but does not include a vehicle described in paragraph (d)(2) of this section. For purposes of this definition, a vehicle consists of a chassis, or a chassis and a body if the vehicle has a body, but does not include the vehicle's load. Therefore, in determining whether a vehicle is a "highway vehicle," it is immaterial that the vehicle is designed to perform a highway transportation function for only a particular kind of load, such as passengers, furnishings and personal effects (as in a house, office, or utility trailer), a special type of cargo, goods, supplies, or materials, or, except to the extent otherwise provided in paragraph (d)(2)(i) of this section, machinery or equipment specially designed to perform some off-highway task unrelated to highway transportation. In the case of specially designed machinery or equipment, it is also immaterial, except as provided in paragraph (d)(2)(i) of this section, that such machinery or equipment is permanently mounted on the vehicle. For purposes of paragraph (d) of this section, the term "transport" includes the term "tow," and the term "public highway" includes any road (whether a Federal highway, State highway, city street, or otherwise) in the United States which is not a private roadway. A vehicle which is not a highway vehicle within the meaning of this paragraph shall be treated as a nonhighway vehicle for purposes of this subchapter. Examples of vehicles that are designed to perform a function of transporting a load over the public highways are passenger automobiles, motorcycles, buses, and highway-type trucks, truck tractors, trailers, and semitrailers.

(2) Exceptions. (i) Certain specially designed mobile machinery for nontransportation functions. A self-propelled vehicle, or trailer, or semitrailer, is not a highway vehicle if it (A) consists of a chassis to which there has been permanently mounted (by welding, bolting, riveting, or other means) machinery or equipment to perform a construction, manufacturing, processing, farming, mining, drilling, timbering, or operations similar to any one of the foregoing enumerated operations if the operation of the machinery or equipment is unrelated to transportation on or off the public highways, (B) the chassis has been specially designed to serve only as a mobile carriage and mount (and a power source, where applicable) for the particular machinery or equipment involved, whether or not such machinery or equipment is in operation, and (C) by reason of such special design, such chassis could not, without substantial structural modification, be used as a component of a vehicle designed to perform a function of transporting any load other than that particular machinery or equipment or similar machinery or equipment requiring such a specially designed chassis.

(ii) Certain vehicles specially designed for offhighway transportation. A self-propelled vehicle, or a trailer or semi-trailer, is not a highway vehicle if it is (A) specially designed for the primary function of transporting a particular type of load other than over the public highway in connection with a construction, manufacturing, processing, farming, mining, drilling, timbering, or operation similar to any one of the foregoing enumerated operations, and (B) if by reason of such special design, the use of such vehicle to transport such load over the public highways is substantially limited or substantially impaired. For purposes of applying the rule of (B) of this subdivision, account may be taken of whether the vehicle may travel at regular highway speeds, requires a special permit for highway use, is overweight, overheight or overwidth for regular highway use, and any other relevant considerations. Solely for purposes of determinations under this paragraph (d)(2)(ii), where there is affixed to the vehicle equipment used for loading, unloading, storing, vending, handling, processing, preserving, or otherwise caring for a load transported by the vehicle over the public highways, the functions are related to the transportation of a load over the public highways even though such functions may be performed off the public highways.

(iii) Certain trailers and semi-trailers specially designed to perform nontransportation functions off the public highways. A trailer or semi-trailer is not a highway vehicle if it is specially designed to serve no purpose other than providing an enclosed stationary shelter for the carrying on of a function which is directly connected with and necessary [to, and at the offhighway site of, a con-] struction, manufacturing, processing, mining, drilling, farming, timbering, or operation similar to any one of the foregoing enumerated operations such as a trailer specially designed to serve as an office for such an operation.

(3) Optional application. For purposes of this subchapter, if any rules existing immediately prior to January 13, 1977 would, if applicable, unequivocally resolve an issue involving the definition of a highway vehicle with respect to a period prior to such date, at the option of the taxpayer, such rules existing prior to such date shall be applied to resolve the issue for all periods prior to such date, and the rules of paragraphs (d)(1) and (2) of this section, which define the term "highway vehicle," shall not apply with respect to such issue for all periods prior to such date.

[6]These categories were:

(1) Body Load units (including Fracmasters, Blenders, Pressure Masters, Slurry Mixers, Slurry Accumixers, Acid Masters and Slurry Masters)
(2) GP Tractor without Blower or Winch
(3) GP Tractor with Blower or Winch
(4) Trailer Mounted:
  (a) Equipment only: Fracmasters, Acid Masters, Acid Frac and Slurry Master
  (b) Cement Air Can & Sand Air Can
  (c) 5000 Gallon Acid Transport
  (d) Sand Dump Trailer
(5) Sand Dump Truck
(6) Line Truck

[7]The trial court's judgment was entered in accordance with the jury's findings under Special Interrogatory 1.

[8]$81,139.88 of the $208,008.73 judgment was attributable to the special fuels and highway use excise taxes paid on the disputed fifth wheel-equipped vehicles for the entire period in question.

[9]I.R.C. § 4041(a) reads:

Diesel fuel. — There is hereby imposed a tax of 4 cents a gallon upon any liquid (other than any product taxable under section 4081)—

(1) sold by any person to an owner, lessee, or other operator of a diesel-powered highway vehicle, for use as a fuel in such vehicle; or

(2) used by any person as a fuel in a diesel-powered highway vehicle unless there was a taxable sale of such liquid under paragraph (1).

[10]T.D. 6881 ¶2, 1966-1 C.B. 247 states, in pertinent part:

(c) *Motor vehicles.* — (1) *In general.* — The term "motor vehicle" includes all types of vehicles propelled by motor which are designed for carrying loads from one place to another, regardless of the type of load or material carried and whether or not the vehicle is registered or required to be registered for highway use, such as forklift trucks used to carry loads at railroad stations, industrial plants, warehouses, etc. The term does not include farm tractors, trench diggers, power shovels, bulldozers, road graders or rollers, and similar equipment which does not carry a load; nor does it include any vehicle which moves exclusively on rails.

(2) *Temporary loss of classification as a motor vehicle.* (i) A vehicle on which equipment or machinery having a specialized use (as for example specialized oil-field machinery) is mounted and which (except for the provisions of this subparagraph) would be considered a motor vehicle under subparagraph (1) of this paragraph shall not be considered a motor vehicle during a period in which it does not have the essential characteristics of a motor vehicle. Such vehicle will be considered as not having the essential characteristics of a motor vehicle during the period the vehicle is incapable of motion and the equipment or machinery is performing the operation for which it is primarily adapted if—

(a) The primary use of such equipment or machinery is other than in connection with the loading, unloading, handling, preserving, or otherwise caring for any cargo transported on the vehicle,

(b) A "setting-up" process involving the expenditure of a substantial amount of time and effort is necessary to place the vehicle in such an immobilized and operative condition,

(c) After expending the necessary substantial time and effort the vehicle has the essential characteristics of an immobile piece of equipment or machinery designed for a specialized use, and

(d) A "break-down" process involving a substantial amount of time and effort is required to restore the vehicle to a mobile condition.

* * * * * *

(ii) The provisions of subdivision (i) of this subparagraph may be illustrated by the following example:

Example. (a) The X Company which is engaged in the oil well servicing business uses a motor vehicle which is primarily adapted to oil well servicing. On June 1, 1965, X Company moves the motor vehicle from its permanent yard and travels to a wellhead which is to be serviced. At the wellhead, it is necessary to go through a "setting-up" process before the vehicle is capable of servicing the oil well. This process requires that a derrick-mast be erected and four guy wires attached to the top of the mast and four to the middle of the mast. The guy wires are then hooked to deadman anchors which are set into the ground. Hydraulic jacks are used to remove all of the weight of the mast from the rear wheels of the vehicle and the front end of the vehicle is jacked up in order to insure the correct pitch of the mast. Outriggers are attached to the bottom of the mast and are laid on the ground to insure further stability. These operations are essential in order that the mast be secure and level over the wellhead and, when completed, the vehicle is incapable of movement. Three men perform this "setting-up" process in 2 hours and complete such process at noon on June 1, 1965, at which time the oil-well-servicing equipment is operative. The power used for operating the special equipment needed to service the oil well is obtained by means of a power transfer from the same motor which is used to propel the vehicle. The vehicle remains at the well-

head until June 10, 1965, at which time the servicing operations are completed. It takes three men 1½ hours to "break-down" the unit and to restore the vehicle to a mobile condition. The "break-down" process is completed at noon on such date.

(b) It can be ascertained from the facts that it was necessary to expend a substantial amount of time and effort to place the vehicle in an immobilized condition and to place the equipment in an operative condition, and after expending such time and effort, the vehicle possessed the essential characteristics of an immobile piece of equipment designed for oil well servicing. Furthermore, the "break-down" process also involves substantial time and effort to return the vehicle to a mobile condition and to render the oil-well-servicing equipment inoperative. Accordingly, from noon on June 1, 1965, until noon on June 10, 1965, the vehicle is not considered a motor vehicle. At all other times, such vehicle is considered a motor vehicle.

[11]The current version of I.R.C. §§ 4481(a) and 4482(a) states:

§ 4481. Imposition of tax

(a) *Imposition of tax.* — A tax is hereby imposed on the use of any highway motor vehicle which (together with the semitrailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of more than 26,000 pounds, at the rate of $3.00 a year for each 1,000 pounds of taxable gross weight or fraction thereof. In the case of the taxable period beginning on July 1, 1984, and ending on September 30, 1984, the tax shall be at the rate of 75 cents for such period for each 1,000 pounds of taxable gross weight or fraction thereof.

§4482. Definitions

(a) *Highway motor vehicle.* — For purposes of this subchapter, the term "highway motor vehicle" means any motor vehicle which is a highway vehicle.

[12]Western has also suggested that this Court's use of the primary design test to resolve a manufacturers' excise tax question in *Big Three Indus. Gas & Equip. Co. v. United States*, 329 F.Supp. 1273 (S.D.Tex. 1971), *aff'd on district court opinion*, 459 F.2d 1042 (5th Cir. 1972) constituted a judicial interpretation of the meaning of the statutory term "highway vehicle," precluding administrative modification of the definition. Whatever the merits of Western's theory of preclusion, the argument is flawed by the erroneous assumption that the § 4061(a) definition of "highway vehicle" controls interpretations of that term under the special fuels and highway use taxes. Consideration of the validity of the 1977 regulation is properly conducted in the context of the construction given I.R.C. §§ 4041(a) and 4482(a). *Big Three*, like the administrative interpretations of § 4061(a), is not implicated in our decision.

[13]Western also contends that, even if the primary design standard has not achieved the stature of positive law through congressional re-enactment of

the underlying statutes, the 1977 regulation's inconsistency with that standard renders it invalid as an unreasonable interpretation of the special fuel and highway use taxes. But this argument also proceeds from the faulty premise that the primary design standard was, prior to promulgation of the 1977 regulations, consistently applied in interpretation of the incidence of the special fuels and highway use taxes. Our rejection of that premise dictates rejection of this attack on the validity of the 1977 regulation.

[14]The Court of Claims subsequently limited the *IBM* ruling to its facts. *Knetsch v. United States*, 348 F.2d 932, 940 n. 14, 172 Ct.Cl. 378 (1965), *cert. denied*, 383 U.S. 957, 86 S.Ct. 1221, 16 L.Ed.2d 300 (1966).

INTERNAL REVENUE CODE

SEC. 4041 IMPOSITION OF TAX.

(a) DIESEL FUEL. There is hereby imposed a tax of 4 cents a gallon upon any liquid (other than any product taxable under section 4081)

(1) sold by any person to an owner, lessee, or other operator of a diesel-powered highway vehicle, for use as a fuel in such vehicle; or

(2) used by any person as a fuel in a diesel-powered highway vehicle unless there was a taxable sale of such liquid under paragraph (1).

SEC. 4061. IMPOSITION OF TAX.

(a) TRUCKS, BUSES, TRACTORS, ETC.

(1) Tax Imposed. There is hereby imposed upon the following articles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof) sold by the manufacturer, producer, or importer a tax of 10 percent of the price for which so sold, except that on and after October 1, 1984, the rate shall be 5 percent.

Automobile truck chassis.

Automobile truck bodies.

Automobile bus chassis.

Automobile bus bodies.

Truck and bus trailer and semitrailer chassis.

Truck and bus trailer and semitrailer bodies.

Tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer.

A sale of an automobile truck, bus, truck or bus trailer or semitrailer shall, for the purposes of this subsection, be considered to be a sale of a chassis and of a body enumerated in this subsection.

(2) Exclusion For Light-Duty Trucks, Etc. The tax imposed by paragraph (1) shall not apply to a sale by the manufacturer, producer, or importer of the following articles suitable for use with a vehicle having a gross vehicle weight of 10,000 pounds or less (as determined under regulations prescribed by the Secretary).

Automobile truck chassis.

Automobile truck bodies.

Automobile bus chassis.

Automobile bodies.

Truck trailer and semitrailer chassis and bodies, suitable for use with a trailer or semitrailer having a gross vehicle weight of 10,000 pounds or less (as so determined).

SEC. 4481 IMPOSITION OF TAX.

(a) IMPOSITION OF TAX. A tax is hereby imposed on the use of any highway motor vehicle which (together with the semitrailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of more than 26,000 pounds, at the rate of $3.00 a year for each 1,000 pounds of taxable gross weight or fraction thereof. In the case of the taxable period beginning on July 1, 1977, and ending on September 30, 1977, the tax shall be at the rate of 75 cents for such period for each 1,000 pounds of taxable gross weight or fraction thereof.

SEC. 4482. DEFINITIONS.

(a) HIGHWAY MOTOR VEHICLE. For purposes of this subchapter, the term "highway motor vehicle" means any motor vehicle which is a highway vehicle.

TREASURY REGULATIONS

Reg. 119, Sec. 324.10. Meaning of terms

(c) The term "diesel-powered highway vehicle" has reference to the type of vehicle and not the use which is made of the vehicle. The term includes any vehicle powered or propelled by a diesel motor or engine and of the type which is capable of general use upon public highways, such as automobile trucks, busses, highway tractors, etc. The term does not, however, include equipment designated primarily for off-highway use, such as road graders, bulldozers, power shovels, earth movers, farm tractors, etc.

§ 48.4041-7 Definitions (before 1977 amendment)

For purposes of the regulations in this subpart, unless otherwise expressly indicated:

(a) Highway. The term "highway" includes any road (whether a Federal highway, State highway, city street, or otherwise) in the United States which is not a private roadway.

(b) Highway vehicle. The term "highway vehicle" has reference to the type of vehicle and not to the use which is made of the vehicle. The term means any motor vehicle, whether powered by diesel fuel or special motor fuel which is of the type used for transportation on the highways. It includes automobile trucks, buses, highway tractors, trolley buses, and other similar type vehicles. The term "highway vehicle" does not include any vehicle, which, although propelled by means of its own motor, is of a type not used for highway

transportation, that is, of a type designed and manufactured for a purpose other than highway transportation. For example, vehicles such as earth movers, power shovels, trench diggers, and bulldozers, which are designed and manufactured as self-propelled units for "off-the-road" operations, are not highway vehicles. Neither are such motorized vehicles as road graders or rollers, which are designed and manufactured for construction or maintenance of roads, considered to be highway vehicles. The same is true of farm tractors, cotton pickers, and other motorized agricultural implements of a similar nature. However, the fact that equipment or machinery having a specialized use (as for example, an air compressor, crane, or specialized oilfield machinery) is mounted on a vehicle which, apart from such equipment or machinery, is of a type used for highway transportation will not remove such vehicle from classification as a highway vehicle.

(c) **Motor vehicle.** The term "motor vehicle" includes all types of vehicles propelled by motor which are designed for carrying loads from one place to another, regardless of the type of load or material carried and whether or not the vehicle is registered or required to be registered for highway use, such as fork lift trucks used to carry loads at railroad stations, industrial plants, warehouses, etc. The term does not include farm tractors, trench diggers, power shovels, bulldozers, road graders or rollers, and similar equipment which does not carry a load; nor does it include any vehicle which moves exclusively on rails.

§ 48.4041-7. Definitions (as amended January 13, 1977)

For purposes of the regulations in this subpart, unless otherwise expressly indicated:

(a) **Highway.** The term "highway" includes any road (whether a Federal highway, State highway, city street, or otherwise) in the United States which is not a private roadway.

(b) **Diesel-powered highway vehicle. (1) In general.** The term "diesel-powered highway vehicle" means any highway vehicle (within the meaning of paragraph (b)(2) of this section) which is also a motor vehicle (as defined in paragraph (c) of this section) and which uses diesel fuel (as defined by paragraph (e) of this section) for propulsion purposes.

(2) Highway vehicle. The term "highway vehicle" has the same meaning assigned to such term under § 48.4061(a)-1(d).

(c) **Motor vehicles.** The term "motor vehicle" includes all types of vehicles propelled by motor which are designed for carrying or towing loads from one place to another, regardless of the type of load or material carried or towed and whether or not the vehicle is registered or required to be registered for highway use, such as fork lift trucks used to carry loads at railroad stations, industrial plants, warehouses, etc. The term does not include farm tractors; nor does it include trench diggers, power shovels, bulldozers, road graders or rollers, and similar equipment which does not carry or tow a load; nor does it include any vehicle which moves exclusively on rails.

§ 41.4481-1. Imposition of Tax (before 1977 amendment)

(a) **In general.** A tax is imposed for each taxable period upon the use, at any time during such period, on the public highways in the United States of any highway motor vehicle which has a taxable gross weight in excess of 26,000 pounds. The tax is imposed upon the use of such a highway motor vehicle only if, at the time of the use of such vehicle, it is registered or required to be registered in the name of a person (whether or not such person is the person who uses the vehicle). See, however, §§ 41.4483-1 and 41.4483-2, relating, respectively, to exemption from the tax in the case of highway motor vehicles used by a State or any political subdivision thereof and in the case of certain transit-type buses. For definition of the terms "registered," "highway motor vehicle,"

"taxable gross weight," "taxable year," and "use," see §§ 41.4481-3, 41.4482(a)-1, 41.4482(b)-1, and 41.4482(c)-1(b) and (c), respectively.

§ 41.4482(a)-1 Definition of Highway Motor Vehicle (before 1977 amendment)

(a) In general. The term "highway motor vehicle" means any vehicle which is propelled by means of its own motor, whether such motor is powered by gasoline, diesel fuel, special motor fuels, electricity or otherwise, and which is of a type used for highway transportation. Such term does not include any vehicle which moves exclusively on rails. The term does, however, include trolley buses or coaches and other similar type vehicles.

(b) Motor vehicles. The term "highway motor vehicle" does not include any vehicle which is not propelled by means of its own motor. For example, trailers and semitrailers used in combination with highway trucks or truck-tractors are not vehicles the use of which is subject to the tax imposed by section 4481(a). However, trailers or semitrailers customarily used in combination with highway trucks or truck-tractors are taken into account in determining the taxable gross weight (§ 41.4482(b)-1) of the highway motor vehicle, which is the base of the tax.

(c) Highway vehicle. The term "highway motor vehicle" does not include any vehicle which, although propelled by means of its own motor, is of a type not used for highway transportation, that is, of a type designed and manufactured for a purpose other than highway transportation. For example, vehicles such as earth movers, trench diggers, and bulldozers, which are designed and manufactured as self-propelled units for "off-the-road" operations, are not highway motor vehicles for purposes of the regulations in this part. Neither are such motorized vehicles as road graders or rollers, which are designed and manufactured for construction or

maintenance of roads, considered to be highway motor vehicles. The same is true of farm tractors, cotton pickers, and other motorized agricultural implements of a similar nature. However, the fact that equipment or machinery having a specialized use (as for example, an air compressor, crane, or specialized oil-field machinery) is mounted on a vehicle which, apart from such equipment or machinery, is of a type used for highway transportation will not remove such vehicle from classification as a highway motor vehicle.

Treasury Regulations § 41.4482(a)-1
(as amended January 13, 1977)

(c) Highway vehicle. For the definition of the term "highway vehicle" as used in this subchapter, see § 48.4061(a)-1(d). [Reg. § 41.4482(a)-1.]

Pre-January 1977 Treasury Regulations on Manufacturers and Retailers Excise Tax (1954 Code) (26 C.F.R.), T.D. 6648, 1963-1 C.B. 197; T.D. 6401, 1959-2 C.B. 258:

SEC. 48.4061(a)-1

(d) Nonhighway vehicles. A chassis or body specified in section 4061(a) (see paragraph (a) of this section) which is not designed for highway use is not subject to the tax imposed by such section. The following are examples of vehicles which are not designed for highway use, and, therefore, not taxable: Road graders, bulldozers, power shovels, earth movers, farm tractors, motor-driven vehicles designed and adapted for use in pulling or drawing vehicles around the premises of factories and railway stations, and small trucks for handling baggage and trunks at railway stations.

Treasury Regulations Sec. 48.4061(a)-1 Treasury Regulations, as amended January, 1977:

(d) Highway Vehicle. (1) Definition. For purposes of this subchapter, the term "highway vehicle" means any self-propelled vehicle, or any trailer or semitrailer, designed to perform a function of transporting a load over public highways, whether or not also designed to perform other functions, but does not include a vehicle described in paragraph (d)(2) of this section. For purposes of this definition, a vehicle consists of a chassis, or a chassis and a body if the vehicle has a body, but does not include the vehicle's load. Therefore, in determining whether a vehicle is a "highway vehicle," it is immaterial that the vehicle is designed to perform a highway transportation function for only a particular kind of load, such as passengers, furnishings and personal effects (as in a house, office, or utility trailer), a special type of cargo, goods, supplies, or materials, or, except to the extent otherwise provided in paragraph (d)(2)(i) of this section, machinery or equipment specially designed to perform some off-highway task unrelated to highway transportation. In the case of specially designed machinery or equipment, it is also immaterial, except as provided in paragraph (d)(2)(i) of this section, that such machinery or equipment is permanently mounted on the vehicle. For purposes of paragraph (d) of this section, the term "transport" includes the term "tow," and the term "public highway" includes any road (whether a Federal highway, State highway, city street, or otherwise) in the United States which is not a private roadway. A vehicle which is not a highway vehicle within the meaning of this paragraph shall be treated as a nonhighway vehicle for purposes of this subchapter. Examples of vehicles that are designed to perform a function of transporting a load over the public highways are passenger automobiles, motorcycles, buses, and highway-type trucks, truck tractors, trailers, and semi-trailers.

(2) Exceptions. (i) Certain specially designed mobile machinery for non-transportation functions. A self-propelled vehicle, or trailer or semi-trailer, is not a highway vehicle if it (A) consists of a chassis to which there has been permanently mounted (by welding, bolting, riveting, or other means) machinery or equipment to perform a construction, manufacturing, processing, farming, mining, drilling, timbering, or operation similar to any one of the foregoing enumerated operations if the operation of the machinery or equipment is unrelated to transportation on or off the public highways, (B) the chassis has been specially designed to serve only as a mobile carriage and mount (and a power source, where applicable) for the particular machinery or equipment involved, whether or not such machinery or equipment is in operation, and (C) by reason of such special design, such chassis could not, without substantial structural modification, be used as a component of a vehicle designed to perform a function of transporting any load other than that particular machinery or equipment or similar machinery or equipment requiring such a specially designed chassis.

(ii) Certain vehicles specially designed for offhighway transportation. A self-propelled vehicle, or a trailer or semi-trailer, is not a highway vehicle if it is (A) specially designed for the primary function of transporting a particular type of load other than over the public highway in connection with a construction, manufacturing, processing, farming, mining, drilling, timbering, or operation similar to any one of the foregoing enumerated operations, and (B) if by reason of such special design, the use of such vehicle to transport such load over the public highways is substantially limited or substantially impaired. For purposes of applying the rule of (B) of this subdivision, account may be taken of whether the vehicle may travel at regular highway speeds, requires a special permit for highway use, is overweight, overheight or overwidth for regular highway use, and any other relevant considerations.

Solely for purposes of determinations under this paragraph (d)(2)(ii), where there is affixed to the vehicle equipment used for loading, unloading, storing, vending, handling, processing, preserving, or otherwise caring for a load transported by the vehicle over the public highways, the functions are related to the transportation of a load over the public highways even though such functions may be performed off the public highways.

(iii) Certain trailers and semi-trailers specially designed to perform non-transportation functions off the public highways. A trailer or semi-trailer is not a highway vehicle if it is specially designed to serve no purpose other than providing an enclosed stationary shelter for the carrying on of a function which is directly connected with and necessary [to, and at the off-highway site of, a con-] struction, manufacturing, processing, mining, drilling, farming, timbering, or operation similar to any one of the foregoing enumerated operations such as a trailer specially designed to serve as an office for such an operation.

(3) Optional application. For purposes of this subchapter, if any rules existing immediately prior to January 13, 1977 would, if applicable, unequivocally resolve an issue involving the definition of a highway vehicle with respect to a period prior to such date, at the option of the taxpayer, such rules existing prior to such date shall be applied to resolve the issue for all periods prior to such date, and the rules of paragraph (d)(1) and (2) of this section, which define the term "highway vehicle," shall not apply with respect to such issue for all periods prior to such date.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

Jan. 24, 1973.

Civ. No. 1969-341

ALLIED BITUMENS, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant.

OPINION

CURTIN, District Judge.

This is an action under Title 28, United States Code, Section 1346(a)(1). The complaint alleges that the Internal Revenue Service erroneously and illegally collected from the plaintiff federal highway use taxes of $11,532, penalties of $967 and interest of $1,208.35 for the fiscal years ending June 30, 1963 through 1968. The vehicles involved are asphalt distributors and slurry machines, which are truck-like vehicles used in the construction and maintenance of highways. The sole issue is whether or not these vehicles are "highway motor vehicles" within the meaning of Title 26, United States Code, Section 4482(a) and therefore subject to the highway use tax imposed by Title 26, Section 4481 of the Code. Presently pending are motions by both parties for summary judgment.

The facts were stipulated by the parties and are as follows: The plaintiff corporation [hereinafter Allied] has been engaged in the business of constructing and repairing roads and highways in the Buffalo, New York, area for a number of years, including the years in question in this lawsuit. The bulk of this construction business involves the resurfacing of roads

and highways with liquid asphalt, either manufactured by Allied in its own asphalt plant or purchased from a larger asphalt plant in the Buffalo area. The asphalt surface is spread on the road being repaired either by an asphalt distributor, a tank-type truck, or by a slurry machine, also a truck-like vehicle.

The asphalt distributor resembles a large heavy-duty tank truck with the addition of an auxiliary engine and pumps on the rear of the truck. It consists of a truck cab and chassis upon which is mounted a heavy-duty, specially insulated tank capable of being heated by gas jets mounted beneath the tank on the truck chassis. At the rear of the truck, behind the tank, is an auxiliary engine which provides the power to drive pumps which draw the liquid asphalt out of the tanks and force it, under pressure, into the nozzles mounted on brooms at the rear of the truck, where the asphalt is then spread on the roadbed as required. The consistency and thickness of the asphalt applied on the road are determined by the heat of the mixture in the tank, the rate of application which is adjusted by special calibrated instruments on the rear of the truck tank, and the rate of speed the truck is driven during the application. Following application of the asphalt to the roadbed, an aggregate, usually in some form of crushed rock, is spread on the asphalt before it dries and the new surface is then rolled. The distributor, whose tank holds about 2,000 gallons of liquid asphalt, can treat approximately one-quarter to one-half mile of road for each tank of asphalt, depending upon the rate of application and driving speed of the distributor. In actual operation, Allied will send the distributor to the jobsite empty. There, by means of connecting hoses, it is filled and refilled as necessary by a tank truck. When operating, distributors spray liquid asphalt on the area to be surfaced at a speed of three to four miles per hour. The asphalt distributors are always left at the jobsite until the completion of the job, at

which time they are driven to the next jobsite or back to the main office.

In addition to the asphalt distributors operated by the plaintiff corporation, several other distributors, known as slurry machines, have been operated since 1967. The slurry machine consists of two small square tanks, one for liquid asphalt and one for water, behind which is mounted a large hopper for aggregate (crushed rock or similar material) and cement. The entire machine is mounted on a truck cab and chassis for mobility. At the jobsite, liquid asphalt is pumped from a tanker, transported to the jobsite for that purpose, just as for the asphalt distributors, into one of the small tanks on the machine, and water from a nearby fire hydrant or other water source is pumped into the other small tank. The aggregate or crushed rock is then placed in the hopper at the rear together with small amounts of cement, and the various ingredients are mixed within the slurry machine itself and sprayed on the road, in the proper consistency, by means of a pump and high pressure nozzles located at the rear of the truck. Because of their small capacity and the need for additions of water and aggregate, the slurry machines never transport liquid asphalt or any other material to and from the jobsite. They are used solely at the jobsite for mixing and applying the liquid asphalt and aggregate mixture to the road.

Title 26, United States Code, Section 4481(a), imposes a tax upon the use of any "highway motor vehicle" which has a taxable gross weight of more than 26,000 pounds. Title 26, United States Code, Section 4482, defines "highway motor vehicle" as:

> (a) Highway motor vehicle. — For purposes of this subchapter, the term "highway motor vehicle" means any motor vehicle which is a highway vehicle.

An additional definition is given in the Treasury Regulations (26 C.F.R. § 41.4482(a)-1). It provides in pertinent part:

> (a) In general. The term "highway motor vehicle" means any vehicle which is propelled by means of its own motor, . . . and which is of a type used for highway transportation. . . .
>
> * * * * * *
>
> (c) Highway vehicle. The term "highway motor vehicle" does not include any vehicle which, although propelled by means of its own motor, is of a type not used for highway transportation, that is, of a type designed and manufactured for a purpose other than highway transportation. For example, vehicles such as earth movers, trench diggers, and bulldozers, which are designed and manufactured as self-propelled units for "off-the-road" operations, are not highway motor vehicles for purposes of the regulations in this part. Neither are such motorized vehicles as road graders or rollers, which are designed and manufactured for construction or maintenance of roads, considered to be highway motor vehicles. . . .

The Treasury Regulations define a highway vehicle according to the use to which that vehicle is put. Based on the record in this case, these vehicles were not used for transportation but for maintenance and repair of highways. Except for actual repair or construction of the road surfaces, the machines use the highway only to travel to and from the jobsite. Further, although they resemble trucks, they are almost never used for hauling. In fact, they almost always proceed to the jobsites empty and are loaded there with the materials necessary for road construction.

New York State has not imposed the usual truck registration on them. Rather than subjecting them to the New York State Highway Use Tax,[1] the New York Tax Law creates a special exemption for road building machines.[2] Under the New

York Vehicle and Traffic Law, these vehicles are registered as road building machines and pay an annual fee of $2.00.[2a]

In a similar case, Rossi v. United States, 220 F.Supp. 694 (D.Me.1963), Judge Gignoux's examination of the legislative history of the statute involved here led him to conclude that Congress intended to tax vehicles used for highway transportation, but not vehicles used for highway construction. That case notes that the statute was designed to finance new highway construction by taxing those vehicles which give roads the hardest use. The limited annual mileage[3] which these vehicles attain at slow speeds and their use, which was almost entirely for road construction, compel this court to conclude that they were not the type of vehicles which Congress intended should be subject to the tax. *See* Stafford Well Service, Inc. v. United States, 340 F.Supp. 657 (D.Wyo.1972).

Because of all these considerations, neither the asphalt distributors nor the slurry machines are "highway motor vehicles" within the meaning of Title 26, United States Code, Section 4482. Thus, for these vehicles, Allied should not be subject to the tax imposed by Title 26, United States Code, Section 4481(a).

The exact amount of the refund due, including interest, shall be recomputed, by agreement between the parties. The plaintiff shall then present a proposed judgment to the court, upon notice to the defendant. The judgment shall be presented on or before March 23, 1973.

So ordered.

FOOTNOTES

[1] New York Tax Law § 503, McKinney's Consol. Laws, c. 60.

[2] *Id.* § 501(2).

[2a] New York Vehicle and Traffic Law § 401, McKinney's Consol. Laws, c. 71.

[3] The average annual mileage of the asphalt distributors and slurry machines is about 4,000 to 6,000 miles.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

April 17, 1972.

Civ. No. 5568

STAFFORD WELL SERVICE, INC.,
a Wyoming corporation, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

MEMORANDUM OPINION

KERR, District Judge.

This case involves the applicability of a federal highway use tax to certain vehicles operated by Stafford Well Service, Inc., in its oil service business.

Jurisdiction is predicated upon Title 28, United States Code, Sections 1346(a)(1) and 1402(a).

Stafford Well Service, Inc., (hereinafter referred to as "Stafford") is engaged in the oil well servicing business. Stafford employs the use of seven large, self-contained derrick tractor trucks which can be driven to a well site and the derrick placed in an upright, vertical position under its own source of power.

The seven vehicles were driven on public highways during the tax year in question a total of 3,455 miles and the United States of America levied on Stafford a highway use tax pursuant to Section 4481(a) of the Internal Revenue Code. The tax was assessed on the use of the highways from July 1, 1969, to June 30, 1970, and amounted to the sum of $1,260.00. Stafford paid the tax and filed a claim for remittance. The claim for

remittance was rejected by the Internal Revenue Service on February 1, 1971.

The issue in question is whether plaintiff's trucks are subject to the highway use tax imposed by 26 U.S.C. § 4481.

The statute requires that a use tax be imposed"* * * on the use of any highway motor vehicle which (together with the semitrailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of more than 26,000 pounds, * * *." 26 U.S.C. § 4481(a).

Since the taxable gross weight of each of plaintiff's vehicles is in excess of 26,000 pounds, and each vehicle is more than 96 inches in width, the issue narrows down to whether plaintiff's trucks are highway motor vehicles within the meaning of the statute.

The statute defines "highway motor vehicle" as meaning "* * * any motor vehicle which is a highway vehicle." 26 U.S.C. § 4482(a).

A Treasury Regulation presents a more explicit definition stating in general that "The term 'highway motor vehicle' means any vehicle which is propelled by means of its own motor, whether such motor is powered by gasoline, diesel fuel, special motor fuels, electricity or otherwise, and *which is of a type used for highway transportation*." 26 C.F.R. 41.4482(a)-1(a). (Emphasis supplied)

The Regulation further states that "The term 'highway motor vehicle' does not include any vehicle which, although propelled by means of its own motor, is of a type not used for highway transportation, that is, of a type designed and manufactured for a purpose other than highway transportation." The regulation goes on to state, however, that "* * * the fact that equipment or machinery having a specialized use (as for example, an air compressor, crane, or specialized oil field machinery) is mounted on a vehicle which, apart from such equipment or machinery, is of a type used for highway trans-

portation will not remove such vehicle from classification as a highway motor vehicle." 26 C.F.R. 41.4482(a)-1(c).

Appropriate case law dealing with the issue presented here is scarce. Two cases which lend authority to this matter are Rossi v. United States, 220 F.Supp. 694 (D.C.Me. 1963), and Carl Nelson Logging Company v. United States, 281 F.Supp. 671 (D.C.Idaho 1967).

The Rossi case involved twenty heavy duty Mack trucks, all of which exceeded 96 inches in width. These trucks were confined, by Maine law, to highway and bridge construction areas except when driven from site to site pursuant to special permit. In some instances public highways may have been used when the trucks moved to a different site. The government levied taxes upon the use of the public highways pursuant to 26 U.S.C. § 4481(a).

An action was then brought to recover the taxes paid. The Court stated that "While obviously the trucks were capable of use for highway transportation, it is conceded that during the period in question here they were excluded from the highways of the vast majority of the states, which, like Maine, limited the use of their highways, in the absence of special permit, to vehicles whose width did not exceed 96 inches."

Pursuant to Wyoming law Stafford's trucks are limited in their use of the state highways. Wyo.Stats. (1957) § 31-217.3. The statute forbids the operation on state highways of most vehicles over 96 inches in width. However, special permits can be issued for the temporary use of certain highways. Wyo.Stat. (1957) § 31-217.5. It is further evident that thirty-six states in all require registration of vehicles similar to those operated by Stafford. Polk's Motor Vehicle Registration Manual, R. L. Polk & Co., Pub., Copyright, 1959.

The Rossi case, at p. 695, goes on to state that "* * * [I]n view of the serious legal limitations imposed upon their operation on the highways, by both state and federal law, not only in this state but throughout most of the country, it would be

an unwarranted assumption to conclude that the use of these trucks for highway transportation played any significant part in their design and manufacture." The court discussed, for purposes of comparison, the manufacturers excise tax. If felt it was significant that the manufacturers excise tax did not apply to the vehicles involved in the matter. The Court quoted from a revenue ruling which stated the manufacturers excise tax did not apply to any vehicle " '* * * regardless of width, which is designed or adapted by the manufacturer for purposes predominantly other than the transportation of persons or property on the highway even though incidental highway use may occur.' "

Stafford admits in its brief that while the tractor portion of the rig is subject to the excise tax, the oil field equipment is not. It then argues that under 26 U.S.C. § 4481 such a vehicle is considered a unit and is inseparable for purposes of taxation. This argument is valid since the statute states "A tax is * * * imposed on the use of any highway motor vehicle which (together with the semitrailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of more than 26,000 pounds, * * *." 26 U.S.C. § 4481(a). Stafford then argues that since the vehicle is inseparable by virtue of 26 U.S.C. § 4481(a) the entire vehicle is not subject to the manufacturers excise tax and therefore it cannot be subject to any use tax. This is a plausible argument in light of the above quoted statutory language and the Rossi case.

The Court in the Rossi case concluded that it was not the intent of Congress "* * * to tax vehicles which are *primarily* designed for off-highway use * * *." (Emphasis supplied)

The case of Carl Nelson Logging Company v. United States, 281 F.Supp. 671 (D.C.Idaho 1967), involved the imposition of the use tax (26 U.S.C. § 4481) to four logging trucks employed to haul logs from the logging site to the mill. The Court stated that although the trucks were capable of use on

public highways, "* * * it does not follow that such use was considered significant in their design and manufacture. It seems to this Court that an important criteria should be the *purpose* for which the vehicle was designed and manufactured when determining whether it is subject to the tax in question." (Emphasis supplied). Id. at 674.

[1] Based upon the foregoing authorities, it is only too clear that the Stafford vehicles were designed primarily for off-highway use and are not the type used for highway transportation. Their operation on state and federal highways was limited by state and federal statutes. Stafford's seven vehicles together accumulated only 3,455 miles during the tax year in question, this being strong evidence they were not primarily intended for highway use. Their primary purpose was to move oil field equipment from one job site to another and not to transport property on public highways. The fact that their operation involved the incidental use of public highways does not justify the imposition of the use tax.

The defendant's justification for the imposition of the use tax here is based substantially upon Revenue Ruling 69-340, 1969-1 Cum. Bull. 291. That ruling held, as was stated in Revenue Ruling 70-589 ____ , a "* * * self-propelled motor vehicle designed and constructed to transport specialized oil field equipment and machinery over the highway from one job site to another" is a "* * * 'highway motor vehicle' for purposes of the tax imposed by Section 4481 of the Code."

The question then arises as to the weight the revenue ruling should be given by the Court. It was stated in O'Neill v. United States, 281 F.Supp. 359 (D.C.Ohio 1968), that "Regulations are not entitled to equal weight before the courts. A court has greater freedom when passing on an interpretative rule than a legislative one. In the case of an interpretative rule, the legislature has not delegated power to an agency to make a rule which is binding upon the courts. An interpretative regulation does not prevent a reviewing court from sub-

stituting its judgment on questions of desirability or wisdom. "The law is embodied in the statute and the Court is free to interpret the statute as it sees fit."

[2] No language could more clearly set forth the fact this Court may disregard this revenue ruling since it is an interpretative rule. The Court, therefore, supersedes the revenue ruling in favor of its own interpretation of the statute as set out above.

Accordingly, summary judgment will be entered awarding plaintiff the sum of $1,260.00, together with the legal rate of interest provided therefor.

No. 83-178

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE WESTERN COMPANY OF NORTH AMERICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of the Treasury had the authority to amend the Treasury Regulations interpreting the Manufacturers and Retailers Excise Tax, 26 C.F.R. 48.4061(a)-1(d)(1), to define a "highway vehicle" as "any self-propelled vehicle, or any trailer or semitrailer, designed to perform a function of transporting a load over public highways, whether or not also designed to perform other functions," in place of an earlier definition that excluded from taxation those vehicles that were "primarily designed" or predominantly adapted for use as nonhighway vehicles.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. 15-39) is reported at 699 F.2d 264.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1983, and the court of appeals denied rehearing on May 5, 1983. The petition was filed on August 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The petitioner is a corporation which is engaged in providing specialized oilfield services required in drilling and operating oil and gas wells (Pet. App. 16). These services consist primarily of pumping cement, acid, or a mixture of

sand and water at high pressure into the well to be serviced. The petitioner mounts its specialized well servicing equipment on a truck chassis or trailer, so that it can be driven to the job site and connected to the well to be serviced by means of high pressure pipe (Pet. App. 16). Since the wells serviced by the petitioner's crews are often remote from its district offices, and are also frequently located some distance from the nearest improved road, the petitioner's vehicles are designed to be able to travel at sustained highway speeds as well as to be able to traverse difficult terrain and unimproved private roads (Pet. App. 16-17). In designing vehicles to meet the requirements of the petitioner's business, its engineers frequently specify features and equipment, such as high traction tires, multi-speed transmissions, and extra frame supports, which are not normally needed on vehicles designed exclusively for highway use, but which enable the vehicles to satisfy the legal and practical requirements of highway driving as well as to meet the demands of off-road service (Pet. App. 17-18).

The issue presented in the case is whether the petitioner's vehicles are "highway vehicles" subject to the special fuels and highway use taxes imposed by Sections 4041 and 4481, Internal Revenue Code of 1954 (26 U.S.C.), during the taxable periods 1971 through 1977. Prior to January 13, 1977, the regulation governing the application of the special fuels excise tax stated that the tax was payable on any fuel used in a vehicle "of the type used for transportation on the highways." Treasury Regulations on Manufacturers and Retailers Excise Taxes (1954 Code), Section 48.4041-7(b), T.D. 6505, 1960-2 Cum. Bull. 283, 291. The standard for the imposition of the highway use tax was similar, although stated in the negative; *i.e.*, a vehicle was taxable unless it was "of a type designed and manufactured for a purpose other than highway transportation." Treasury Regulations on Excise Tax on Use of Certain Highway Motor Vehicles

(1954 Code), Section 41.4482(a)-1, T.D. 6216, 1956-2 Cum. Bull. 895, 900-901. See also *Big Three Industrial Gas & Equipment Co.* v. *United States*, 329 F. Supp. 1273, 1274, 1277-1278 (S.D. Tex. 1971), aff'd *per curiam*, 459 F.2d 1042 (5th Cir. 1972) (interpreting the parallel definition of a highway vehicle contained in Treasury Regulations on Manufacturers and Retailers Excise Tax (1954 Code), Section 48.4061(a)-1(d), T.D. 6648, 1963-1 Cum. Bull. 197, 199-200, issued under the manufacturers excise tax on highway motor vehicles, Section 4061, Internal Revenue Code of 1954 (26 U.S.C.)).[1]

On January 13, 1977, the Secretary of the Treasury amended the definition of a highway vehicle for purposes of all three highway-related excise taxes. Treasury Regulations on Manufacturers and Retailers Excise Tax (1954 Code) (26 C.F.R.), Section 48.4061(a)-1(d)(1). The new regulation states that a "highway vehicle" is "any self-propelled vehicle, or any trailer or semitrailer, designed to perform a function of transporting a load over public highways, whether or not also designed to perform other functions." This definition, which appears in the regulations issued under the manufacturers excise tax, was incorporated by reference in the regulations issued under the special fuels and highway use excise taxes at issue here. Treasury Regulations on Excise Tax on Use of Certain Highway Motor Vehicles (1954 Code) (26 C.F.R.) Section 41.4482(a)-1(c); Treasury Regulations on Manufacturers and Retailers Excise Tax (1954 Code) (26 C.F.R.) Section 48.4041-7(b)(2).

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[1]The subdivision of the pre-1977 regulation which the court construed in *Big Three, supra*, 329 F. Supp. at 1274, stated that the tax status of a vehicle depended on whether it was "designed for highway use." Treasury Regulations, *supra*, Section 48.4061(a)-1(d), T.D. 6648, 1963-1 Cum. Bull. 197, 199-200. This terminology led to the "primary design" test developed by the *Big Three* court. 329 F. Supp. at 1277-1278.

This case was tried to a jury and was submitted for a special verdict (Pet. App. 3-12). The questions asked on the special verdict form required the jury first to evaluate each of nine categories of petitioner's vehicles under the "primary design" test developed by the court in *Big Three, supra,* under the pre-1977 regulations, and then to make an independent evaluation of each of the same categories under the 1977 Treasury regulation, *supra.* The jury found that under the *Big Three* test all of petitioner's vehicles were highway vehicles, except two categories of trucks and trailers. The jury further found that, under the test prescribed in the 1977 regulation, all of petitioner's vehicles were highway vehicles (Pet. App. 5-12). The district court, in an apparent but unstated determination that the 1977 regulation was invalid because the *Big Three* test had attained the force of positive law, ordered a refund of the excise taxes paid on the petitioner's equipment transport vehicles for all years in issue, including 1977 (Pet. App. 20).

The court of appeals reversed as to the 1977 regulation, holding that nothing in the sparse legislative history of the highway-related excise taxes, including the special fuel and highway use taxes at issue in this case, indicated that Congress intended to adopt the "primary design" test (Pet. App. 21). The court noted, moreover, that while the definition of "highway vehicle" under the manufacturers excise tax had relied on the "primary design" test, the Department of the Treasury and the courts had developed a broader definition of "highway vehicle" under the special fuel and highway use

taxes at issue here (Pet. App. 21-29).[2] Accordingly, the court of appeals rejected the petitioner's contention that the "primary design" test had achieved the force of positive law "beyond all but legislative modification," and sustained the validity of the 1977 Treasury regulation (Pet. App. 21, 29-30).[3]

ARGUMENT

The holding of the court of appeals sustaining the 1977 Treasury regulation was correct. This Court has twice recently reaffirmed the well-established principle that Treasury Regulations "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes." *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 476-477 (1979); *Fulman* v. *United States*, 434 U.S. 528, 533 (1978). See also *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948). The regulation at issue here is neither unreasonable nor inconsistent with the Internal Revenue Code. Further review by this Court, therefore, is not warranted.

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[2]With respect to the special fuels tax, the pre-1977 regulation stated that the highway-worthiness of a vehicle's design, apart from its incidental use to carry specialized equipment to off-highway destinations, rendered the vehicle subject to taxation (Pet. App. 23). See Treasury Regulations, *supra*, Section 48.4041-7(b), T.D. 6505, 1960-2 Cum. Bull. 283, 291. With respect to the highway use tax, the pre-1977 Regulations adopted essentially the same test as that used for the special fuels tax (Pet. App. 24-25). See Treasury Regulations, *supra*, Section 41.4482(a)-1, T.D. 6216, 1956-2 Cum. Bull. 895, 900-901. Thus, the pre-1977 interpretative history of Code Sections 4041(a) and 4481(a) shows that the Internal Revenue Service adhered to a construction of the statutes that imposed a tax on vehicles designed to carry and capable of carrying specialized loads both over the public highways and off-road (Pet. App. 24).

[3]The court of appeals also held that the district court did not abuse its discretion in refusing to grant a hearing, as requested by the government, to resolve a post-verdict dispute concerning the classification of some of the petitioner's vehicles (Pet. App. 32-33).

The petitioner contends (Pet. 7-12) that the above principle of judicial deference does not apply to the regulation at issue in this case because it is not a contemporaneous construction of the excise tax statutes it interprets, but rather constitutes a departure from prior administrative and judicial constructions that have received implied congressional sanction. However, as this Court pointed out in *National Muffler Dealers Assn.* v. *United States, supra*, 440 U.S. at 485, "[c]ontemporaneity * * * is only one of many considerations that counsel courts to defer to the administrative interpretation of a statute."

The regulation challenged by petitioner provides the foundation for a uniform test for the definition of a "highway vehicle" for purposes of all three highway-related excise taxes. A regulation such as this one, which resolves prior inconsistencies in the treatment of the same subject matter under similar or related statutes, must often be developed in light of administrative and judicial experience under the several statutory schemes involved. The promulgation of a regulation that reconciles prior administrative or judicial interpretations of congressional intent is a classical exercise of the Commissioner's rule-making power, and a regulation adopted in furtherance of this goal is entitled to the same judicial deference as a contemporaneous construction of the statute.[4] *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, 100-101 (1939); *National Muffler Dealers Assn.* v. *United States, supra*, 440 U.S. at 485-486.

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[4] *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16, 25-32 (1982), cited by the petitioner (Pet. 12), does not support its contention that the regulation in issue in this case is invalid. In that case, this Court pointed out that the relevant statutory language and its legislative history directly supported the taxpayer's contention and tended to show that the regulation there challenged was not a reasonable interpretation of the statute. But, as the court of appeals pointed out (Pet. App. 29-30), the petitioner has conceded that the highway-related excise tax statutes

Petitioner also contends (Pet. 15-16) that the decision of the court of appeals conflicts with the decision of the Court of Claims in *International Business Machines* v. *United States*, 343 F.2d 914 (1965), cert. denied, 382 U.S. 1028 (1966). This contention is without merit. As the court of appeals pointed out (Pet. App. 32), in the *IBM* case the plaintiff had made every reasonable effort to obtain its own favorable private ruling similar to that favoring a competitor, whereas here the petitioner never sought a ruling concerning the tax status of its vehicles. Thus, whatever other consequences might result from a letter ruling that had been provided to the manufacturer of petitioner's vehicles, petitioner cannot claim that taxation of its equipment is unfair.[5]

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and the legislative history surrounding their enactment and reenactments provide no evidence that Congress ever approved the "primary use" test.

The petition also alleges (Pet. 14-15) that the decision in this case conflicts with the decision of the Second Circuit in *Allied Bitumens, Inc.* v. *United States*, 485 F.2d 1237 (1973), and with the decision of the Tenth Circuit in *Stafford Well Service, Inc.* v. *United States*, 35 A.F.T.R. 2d 1698 (Mar. 5, 1973). These cases, however, were decided under the law in effect prior to the 1977 regulation at issue here.

[5]The Internal Revenue Code expressly provides that letter rulings may not be used or cited as precedent. 26 U.S.C. 6110(j)(3). Before this statutory provision became effective there was an identical well-established judicial rule precluding reliance on such private rulings by any taxpayer other than the taxpayer to whom the ruling was issued. *Shakespeare Co.* v. *United States*, 389 F.2d 772, 777 (Ct. Cl. 1968).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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